(22,215)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 315.

E AMERICAN RAILROAD COMPANY OF PORTO RICO, PLAINTIFF IN ERROR,

vs.

FEDERICO DIDRICKSEN AND HIS WIFE, LUISA RODRIGUEZ.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

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1 At a Regular Term of the District Court of the United States within and for the District of Porto Rico Began and Held at the City of Ponce, in said District, on the Second Monday in January, the Same Being the 10th Day of that Month, in the Year of Our Lord, 1910, and of the Independence of the United States of America the 143th.

Present: The Hon. Bernard S. Rodey, Judge.

Among the proceeding- had was the rendition of a judgment in the following cause.

Law. No. 242.

FEDERICO DIDRICKSEN and His Wife, LUISA RODRIGUEZ,
vs.
THE AMERICAN RAILROAD COMPANY OF PORTO RICO.

Damages for Death Cause- by Negligence.

Heretofore, to wit: December 26th, 1908 came the plaintiffs by their attorneys and filed in the Clerk's office of the Court aforesaid, a complaint herein, which said complaint is in words and figures as follows; (except those words underlined which were inserted thereafter by leave of court), to wit:

Complaint.

In the District Court of the United States for the District of P. R.

Law. No. —.

FEDERICO DIDRICKSEN and His Wife, LUISA RODRIGUEZ,
vs.
THE AMERICAN RAILROAD COMPANY OF PORTO RICO.

Damages for Death Caused by Negligence.

Complaint.

The plaintiffs complain and allege:

1. That they are subjects of the King of Denmark, and the defendant was on the thirtieth day of November last past, and now is a corporation duly organized under the laws of the State of New York, properly authorized to do business in P. R. and was and now
2 is, the owner in this Island of a certain railroad, known as The American Railroad Company of P. R., together with the track, rolling stock and other appurtenances thereto belonging; and was a common carrier of freight and passengers between San

Juan and Ponce and intermediate points, amongst which is Lajas, in this Island.

2. That plaintiffs are the only heirs and parents of Pedro Didricksen, deceased, upon whom the said plaintiffs greatly depended for their subsistance and support; and they were further the only personal representatives of deceased.

3. That the said Pedro Didricksen died unmarried and without issue at the age of 26 years, and at the time of his injuries and death, hereinafter to be mentioned, deceased was very healthy and of great earning capacity.

4. That on the said 30th day of November 1908, and at the time of the injuries hereinafter mentioned, the said Pedro Didricksen, deceased, was employed and hired by the defendant as one of its Chief Train Operators, and was then acting as and discharging the duties of such Operator at the defendant's Ry. track which is laid behind the Lajas Ry. Station.

5. That before said day, the deceased was employed by defendant as aforesaid, but discharged his duties as such employee at Ponce, very seldom working for the defendant outside of this city.

6. That at the time aforesaid, to wit: on the 30th day of November 1908, and while the said Pedro Didricksen, deceased, was duly and carefully engaged, at the above-named place, in the coupling of two open-platform or flat-cars of defendant, which said work deceased was bound to perform, as such employee, between the said cars and a certain coal-wall that defendant had negligently and previously placed and constructed very close to the above mentioned track, he, the said deceased, was suddenly caught about his abdomen,
by reason of the negligence, carelessness, wrongful act and
3 default of defendant's employees, by and between one of said cars and the said coal-wall and rolled for a certain distance to a place where he fell to the ground, whence he was picked up with very severe internal injuries from which he died on the 8th inst. which death was the direct and immediate consequence of said negligence and injuries.

6 (a). Plaintiffs further say as they are informed and believe that def't was also negligent in not having automatic couplers attached to the cars in question, nor continued brakes, violating thereby the safety appliance Acts of Congress and defendant was further negligent in starting the engine coupled to said two cars while said employee was engaged in said work without notice to him.

7. That plaintiffs duly notified defendant of the occurrence complained of, after the death of said Pedro Didricksen and before the filing of this complaint.

8. That by reason of the premises, the plaintiffs herein have been damaged in the sum of Thirty-thousand ($30000) dollars wherefore, plaintiffs pray judgment in their favor and against the defend-

ant for the sum of Thirty thousand dollars and for the costs of this action.

Ponce, Dec. 28, 1908.

JOSÉ TOUS SOTO,
JOSÉ A. POVENTUD,
Attorneys for Plaintiffs.

Federico Didricksen and Luisa Rodriguez, being duly sworn, depose and say: That they are the plaintiffs in the above-entitled case, and that the facts and statements of the foregoing complaint are true according to their best knowledge, information and belief.

FEDERICO DIDRICKSEN,
LUISA RODRIGUEZ,
Affiants.

Affidavit No. 32.

Sworn to and subscribed before me, by Federico Didricksen and Luisa Rodreguez, of age, of the city of Ponce, married to each other and by me personally known, on this 26 day of December 1908 and the undersigned hereby certifies that the foregoing complaint was duly read and translated to the above-named affiants.

[SEAL.] L. YORDAN DAVILA,
Notary Public.

And afterwards, to wit: January 22 1909, came the defendant by its attorney and filed in the clerk's office of the court aforesaid a demurrer to the complaint herein which said demurrer is as follows:

In the District Court of the United States for the District of Porto Rico.

Law. No. —.

FEDERICO DIDRICKSEN and His Wife, LUISA RODRIGUEZ,
vs.
THE AMERICAN RAILROAD COMPANY OF PORTO RICO.

Damages for Death Caused by Negligence.

Demurrer.

Now comes defendant by its attorney Frederick L. Cornwell, and demurs to complaint herein and for cause thereof says:

I.

That said complaint fails to state facts sufficient to constitute a cause of action.

II.

That said complaint fails to set out and show that plaintiffs' intestate was not guilty of negligence.

III.

That said complaint fails to set out and show the proximate cause of injury.

IV.

That said complaint shows that plaintiffs' intestate was guilty of contributory negligence in this, that he was between the cars and said coal-pile without showing any necessity for being there.

V.

That said complaint shows on its face that its alleged cause of action was brought under the employer's liability act of Porto Rico, and that by said act complainants are limited in their recovery to not exceed a judgment for Three Thousand Dollars. Wherefore this defendant prays that judgment of the Court whether it shall be to answer further and that said complaint be dismissed.

F. L. CORNWELL,
Attorney for Defendant.

And on the 11th day of December A. D. 1909 an entry was made upon the journal of said court in said cause, which said entry is as follows, to wit:

5 Entry.

No. 242. Law, Ponce.

FEDERICO DIDRICKSEN et al.
vs.
THE AMERICAN RAILROAD COMPANY OF PORTO RICO.

This cause is before the Court for hearing on the demurrer to the complaint. N. B. K. Pettingill of counsel for the defendant appearing in support thereof, and Jose A. Poventud in opposition thereto. Counsel for plaintiff thereupon requests and is granted leave to amend his complaint by interlineation by adding to paragraph 6 thereof words as follows:

"Plaintiffs Federico Didricksen and his wife Elisa Rodriguez further say, as they are informed and believe that defendant was also negligent in not having automatic couplers attached to the cars in question, nor continued brakes, violating thereby the safety appliance Act of Congress, and defendant was further negligent in starting the engine coupled to said two cars while said employee was [illegible] said track without notice to him."

The demurrer herein is thereupon considered as applying to the complaint as amended, and the court, after hearing the arguments of

counsel pro and con, overrules the same, to which action of the court counsel for the defendant duly objects and excepts.

The defendant is thereupon given time until Friday the 24th instant in which to file his answer in the cause.

And afterwards, to wit: December 24, A. D. 1909 came the defendant by its attorney and filed in the Clerk's office of said court an answer in said cause, which said answer is as follows, to wit:

District Court of the United States for the District of P'to Rico.

FEDERICO DIDRICKSEN and His Wife, LUISA RODRIGUES,
vs.
THE AMERICAN RAILROAD CO. OF PORTO RICO.

6 *Answer.*

I.

Defendant denies that plaintiffs are the subject of the Kingdom of Denmark and admits the rest of paragraph No. I.

II.

Defendant denies that plaintiffs are the sole heirs and parents of Pedro Didricksen deceased, and defendant further denies that plaintiffs or either of them were dependent upon said Pedro Didricksen for support to any extent whatever.

III.

Defendant denies paragraph No. II of plaintiff's petition.

IV.

Defendant admits that said Pedro Didricksen was an employee of defendant Company on the 30th of November, 1908, but denies that said Pedro Didricksen was a chief train operator and further denies that he was acting and discharging the duties of such operator on defendant's track behind the Lajas station on the 30th of November, 1908.

V.

Defendant denies paragraph No. V of plaintiff's petition.

VI.

Defendant denies paragraph No. VI and VI (a) of plaintiff's petition.

VII.

Defendant denies paragraph No. VII of plaintiff's petition.

VIII.

Defendant denies paragraph No. VIII of plaintiff's petition.

IX.

Defendant alleges that Pedro Didricksen met his death through his own fault and negligence and without any negligence on the part of defendant Company.

X.

Defendant Company alleges that Pedro Didricksen was guilty of contributory negligence and that his own negligence contributed to and was the proximate cause of his injury. Defendant further alleges that the said plaintiffs are without any capacity under the National Employers' Liability Act to sue, for the reason that they are not the personal representatives as required by the statutes of the United States and for the further reason that they have not qualified as administrator, administratrix, executor or executrix as required by law, and no probate proceedings have been had on the estate of said deceased of any nature; and for the further reason that complainants have not been declared by any competent tribunal to be the sole and universal heirs of deceased. Defendant further alleges that the said plaintiff in this case were neither wholly nor in part dependent upon the said Pedro Didricksen for support and maintainance, but that the said Pedro Didricksen during his life and the time when employed by defendant company did not contribute to the support of the plaintiffs o reither of the mi nany manner whatsoever.

7

F. L. CORNWELL,
Attorney for Defendant.

V. Ferrer makes oath according to law deposes and says: that he is the Master of transportation of the American Railroad Company, that he read the foregoing answer and the said answer is true in point of fact to his best knowledge and belief and that he, the deponent, is better informed about the circumstances of said suit than any other employee of defendant company.

V. FERRER.

Numero 21.

Subscribed and sworn to before me this 23 day of December 1909.
[NOTARY'S SEAL.] JOSÉ BENET.

And on the 19th day of January, A. D. 1910, an entry was made upon the journal of said court in said cause, which said entry is as follows:

Entry.

No. 242. Law.

FEDERICO DIDRICKSEN et al.
vs.
THE AMERICAN RAILROAD CO. OF P. R.

This cause comes on for trial, and come the plaintiffs, Federico Didricksen and Luisa Rodriguez Didricksen represented by their

counsel José A. Poventud and comes the defendant the American Railroad Company by its representative, Geo. Findley, and by its counsel F. L. Cornwell, and comes a jury as follows, that is to say: Enrique Caliamno, Manuel Fournier, Eduardo McKormic, Adolfo Pieraldi, Juan E. Serralles, Rafael Pales, C. A. Teller, Manuel Toro Peralta, Manuel A. Toro, E. J. Walsh, José Al Alcaide
8 Cintron and William L. Aguayo, twelve good and lawful men chosen from the body of the district of Porto Rico, duly sworn, examined and empaneled to try the issue joined between the parties.

Whereupon, counsel for the plaintiffs moves for leave to amend his complaint so as to show that the plaintiffs, are, in law the legal heirs and representatives of the deceased Pedro Didricksen, and in support of his motion in that regard he presents a certain certificate from the District Court of Ponce, P. R. Counsel for the defendant opposes the motion to amend and at the conclusion of the arguments, the court grants the motion and the plaintiffs are permitted to amend their complaint by interlineation by inserting after the word "support" in line 14th, the following: "They were further the only personal representatives of deceased." To which action of the court in granting said amendment, counsel for the defendant duly objects and excepts. Thereupon counsel for the defendant renews his demurrer to the complaint as amended and the same is overruled by the court, and it is further ordered that the answer already filed shall be considered as an answer to the complaint as amended.

Thereupon the witnesses for the parties are called, duly sworn and placed under the exclusion rule and the trial of the cause is proceeded with and not being finished at the adjournment hour the further hearing of the same is continued over till tomorrow January 20th, 1910.

And on the 20th day of January A. D. 1910, an entry was made upon the journal of said court in said cause, which said entry is as follows, to wit:

Entry.

No. 242. Law.

[illegible]ICO DIDRICKSEN et al.

vs.

THE AMERICAN RAILROAD CO. OF P. R.

Before proceeding with the further trial of this cause, the
9 Court in chambers, hears the motion of counsel for the defendant for an instruction to the jury for a verdict in behalf of his client, and at the conclusion of the arguments of counsel for the respective parties denied the same. To which action counsel for the defendant duly objects and excepts.

Thereupon counsel for the defendant moves the court to strike out all that part of the evidence of the witness Gustavo Rodriguez as to what the deceased told him some ten or twelve hours after the

alleged accident at a different place from where it occurred, and the court having heard counsel for and against the motion and being fully advised, grants the same. To which action of the court in striking the testimony of said witness counsel for the plaintiffs duly objects and excepts.

Thereafter the court hears the argument of the respective counsel as to the application of the Act of Congress of March 2nd, 1903, regarding automatic couplings and continuous brakes and being in force in Porto Rico, and at the conclusion of their argument, holds that the said Act does apply to Porto Rico.

Thereafter, in open Court come the parties with their counsel as on yesterday. The jury is called and all are found present and the trial is proceeded with. The court thereupon instructs the jury that they are not to consider the evidence of the witness Gustavo Rodriguez heretofore given by him with reference to the statement of the deceased made at a different place from where the alleged accident occurred and some ten or twelve hours after the fact, and also that part of engineer Clausel's evidence that refers to the statement made to him by the *by the* station agent at Lajas. The trial is thereupon again proceeded with. And thereafter counsel for the plaintiffs interposes his objection to the testimony of certain witness for the defendant. The jury is permitted to retire and the court in the mean time hears the argument of the respective counsel and at the conclusion thereof overrules the objection. To which action of the court counsel for the plaintiffs duly objects and excepts.

The jury is then recalled and the trial is continued. At the conclusion of the testimony of all the witnesses for the parties counsel for the defendant renews his motion for an instruction for a verdict in behalf of his client, which motion is again denied by the court and in like manner objected and excepted to. Counsel for the parties thereupon make their arguments to the jury, the court delivers to them its instructions and they retire to their room in charge of the Marshal to consider of their verdict. And thereafter again come the jury and being called and all found present they return into court a verdict as follows: "We, the Jury, find for the plaintiffs and assess their damages in the sum of $6,000.00, six thousand dollars—C. A. Teller, Foreman". The court thereupon asks the jury if this is their verdict, to which they all respond that it is. It is therefore ordered that the said verdict be filed and recorded, and the jury is discharged from the further consideration of the cause. And it is thereupon:

Ordered and adjudged, that the plaintiffs Federico Didricksen and Luisa Rodriguez Didricksen do have and recover of and from the defendant, the American Railroad Company of Porto Rico the sum of ($6,000.00) six thousand dollars with interest on said principal sum at six per cent per annum until paid together with their costs herein laid out and expended to be taxed and that they have execution therefor.

Upon motion of counsel for defendant, counsel for plaintiffs being present and agreeing thereto he is granted time to and includ-

ing the 11th day of February, 1910, in which to file a motion to set aside the verdict and the judgment and for a new trial in this cause.

And afterwards, to wit: the 8th day of February A. D. 1910, came the defendant by its attorney and filed in the Clerk's
11 office of the court aforesaid a motion for a new trial of the cause and an affidavit in support of said motion, which said motion and said affidavit are as follows, to wit:

Motion.

In the District Court of the United States for Porto Rico.

FREDERICO DIDRICKSEN et al.
vs.
THE AMERICAN RAILROAD CO. OF PORTO RICO.

Now comes the American Railroad Company of Porto Rico defendant, by Frederick L. Cornwell, its attorney, and moves the court to vacate the verdict by the jury in this action on the 21st day of January, 1910, and to grant to said defendant American Railroad Company of Porto Rico a new trial of this action for the following causes:

I.

Because said verdict of the jury is contrary to the evidence.

II.

Because the verdict was without evidence to support it.

III.

Because the verdict of the jury is so far contrary to the evidence as to shock the moral sense.

IV.

Because of misconduct of the jury in taking into consideration statements made by juror H. A. Teller which prejudiced the defendant and which are more particularly set out in affidavit attached, marked exhibit "A" made part of this motion.

V.

Because said verdict is contrary to both the law and facts.

VI.

For errors of law occurring in the trial and duly excepted to by the said defendant American Railroad Company at the time.

F. L. CORNWELL,
Attorney for American Railroad Company.

AFFIDAVIT EXHIBIT "A".

In the District Court of the United States for Porto Rico.

FREDERICO DIDRICKSEN et al.
vs.
THE AMERICAN RAILROAD CO. OF PORTO RICO.

12 Frederick L. Cornwell makes oath according to law deposes and says:

"That he is the attorney for the American Railroad Company and was in charge of the defence of the above entitled action. That when said cause was submitted to the jury and after they had brought in their verdict, that three jurors stated to deponent that one of the jurors, to wit; C. A. Teller had stated in the jury-room that the American Railroad Company had offered to settle with the plaintiffs for the sum of $15,000.00 and that another juror whose name deponent does not remember, but who was a school teacher and from Cabo Rojo, wanted to assess the damages in the sum of $50,000.00. That the names of the jurors who stated the aforesaid to deponent are McCormic, Walsh and Toro, and that said jurors had agreed with deponent to make an affidavit covering said facts, but that juror McCormeic informed deponent that he had consulted with the Judge and that the court had advised him not to make same and that said juror McCormic communicated said statement of the court to the other members of the jury and for that reason deponent is unable to present their affidavits.

F. L. CORNWELL.

Subscribed and sworn to before me on this the 7th day of February, 1910.

JOHN L. GAY,
Clerk U. S. Court,
By RICARDO NADAL, *Deputy.*

And on the 11th day of February A. D. 1910, the plaintiffs herein filed in the Clerk's office of said Court an answer and counter-affidavits to defendant's motion for a new trial, which said answer and said affidavits are as follows, to wit:

In the District Court of the United States for Porto Rico.

Ponce, Law. No. 242.

FREDERICO DIDRICKSEN et al.
vs.
THE AMERICAN RAILROAD COMPANY OF PORTO RICO.

13 *Plaintiff's Answer and Counter Affidavits Against Defendant's Motion for a New Trial.*

Now come the above named plaintiffs and, answering defendant's motion for a new trial herein, state and allege as follows:

That the Jury's verdict for plaintiffs in this cause, cannot be disturbed:

I.

Because said verdict is sustained and supported by the clearest and convincing evidence and facts of the case, which were not even contradicted by defendant at the trial.

II.

Because said verdict is in accordance with, and sustained by the law applicable to this case as given and read by the court to the jury.

III.

Because no legal error occur-ed during the trial of this case.

IV.

Because the general exception to the court's instructions, and the specific exceptions filed by defendant after the jury retired are of no avail to said d-fendant; but this is immaterial because there is not a single erroneous instruction given by the court to the jury, all and each of which are absolutely legal and correct.

V.

Because to prove supposed juror's misconduct, the affidavit of defendant's counsel on information and belief is not sufficient and is inadmissible; especially in this so when there is, as in this case, sufficient evidence, aside and apart from said supposed statements in the jury-room, to fully sustain the verdict herein; that it does not appear from defendant's affidavit that said imaginary statements influenced the jury in any manner in rendering their verdict.

VI.

Because paragraph IV. of defendant's motion for a new trial and its affidavit attached thereto charging supposed misconduct of the jury by reason of certain imaginary statements set out in said defendant's affidavit marked exhibit "A", are absolutely untrue and wothout foundation, for the jury in this case rendered their
14 verdict in strict accordance with the facts and law of the same, and basing it exclusively thereon, no misconduct or irregularity of any kind occurring during the trial hereof by any juror or by any one in their presence, all of which conclusively appears from plaintiffs' voluntary affidavits of jurors C. A. Teller, Manuel Fournier, Manuel A. Toro and William L. Aguayo, attached hereto marked respectively exhibits No. 1, 2, 3, and 4 and made part hereof.

For all of which reasons plaintiffs pray this Hon. Court to deny defendant's motion for a new trial herein.

JOSÉ A. POVENTUD,
Attorney for Plaintiffs.

EXHIBIT I.

In the District Court of the United States for Porto Rico, Ponce Division.

Law. No. 242.

FEDERICO DIEDRICHSEN et ux.
v.
THE AMERICAN RAILROAD COMPANY OF PORTO RICO.

Plaintiffs' Counter-affidavit against Defendant's Affidavit on Motion for New Trial.

C. A. Teller, being duly sworn, makes oath according to law and deposes and says:

That he was one of the jurors who tried and decided the above entitled case in favor of plaintiffs; that said case was wholly and exclusively decided on the facts and evidence allowed by the court and on the instructions received from the said court, without extraneous matter, evidence or thing whatever having in any manner interfered with, or influenced the jury; that deponent has not, and did not, state in the jury-room or any where else, during the trial of the above case "that the American Railroad Company had offered to settle with the plaintiffs for the sum of $15,000 nor any other sum"; that nothing was considered by the jury in deciding the above case but the facts and evidence allowed by the court and the law as propounded by it, and that in this case a verdict was unanimously reached very soon after the cause was submitted to the jury
15 by reason of the clear facts of the same; that no misconduct or irregularity of any kind occurred during the trial of this case by any of the jurors or in their presence.

C. A. TELLER, *Juror.*

No. 13. Subscribed and sworn to before me, on this 8th. day of Feb. 1910, by Mr. C. A. Teller, of age, married, of Ponce and by me personally known.

JOSÉ F. FERNANDEZ,
Notary Public.

Affidavit No. 2.

In the District Court of the United States for Porto Rico, Ponce.

LAW. No. 242.

FEDERICO DIDRICKSEN et al.
vs.
THE AMERICAN RAILROAD CO. OF PORTO RICO.

Affidavit of Juror Manuel Fournier.

Manuel Fournier, being duly sworn, deposes and says:
That he was one of the jurors who tried and decided the above entitled cause in favor of plaintiffs; that said case was wholly and exclusively decided on the facts and evidence allowed by the Court and on the instructions received from said Court, without any extraneous —, evidence or thing whatever having in any manner interfered with or influenced the jury; that juror Mr. C. A. Teller did not state in the jury-room or anywhere else, during the trial of the above case, "that the American Railroad Company had offered to settle with the plaintiffs for the sum of $15,000 nor for any other sum"; that juror M. Toro Peralta, a school-teacher from Cabo Rojo, did not want to assess damages in this case in any such large sum as $50,000, but wholly agreed with the verdict herein rendered; that nothing was considered by the jury in deciding the above case, but the facts and evidence allowed by the Court and the law as propounded by it, and that in this case a verdict was unanimously reached very soon after the cause was submitted to the jury by reason of the convincing and clear facts of the same; that no misconduct or irregularity of any kind occurred during the trial of this cause by any of the jurors or in their presence by any one else.

M. FOURNIER, *Juror.*

16 Affidavit No. 239.—Subscribed and sworn to before me, on this 10 day of February, 1910, by Manuel Fournier, of age, married, of Ponce — by me personally known.

JOSÉ TOUS SOTO,
Notary Public.

Affidavit No. 3.

In the District Court of the United States for Porto Rico, Ponce.

Law. No. 242.

FREDERICO DIEDRICKSEN et al.
vs.
THE AMERICAN RAILROAD CO. OF PORTO RICO.

Affidavit of Juror Manuel A. Toro.

Manuel A. Toro, being duly sworn, deposes and says:

That he was one of the jurors who tried and decided the above entitled cause in favor of plaintiffs; that said case was wholly and exclusively decided on the facts and evidence allowed by the Court and on the instructions received from said Court, without any extraneous matter, evidence or thing whatever having in any manner interfered with or influenced the jury; that juror Mr. C. A. Teller did not state in the jury-room or anywhere else, during the trial of the above case, "that the American Railroad Company had offered to settle with the plaintiffs for the sum of $15,000, nor for any other sum"; that juror M. Toro Peralta, a school-teacher from Cabo Rojo, did not want to assess damages in this case in any such large sum as $50,000, but wholly agreed with the verdict herein rendered; that nothing was considered by the jury in deciding the above case, but the facts and evidence allowed by the Court and the law as propounded by it, and that in this case a verdict was unanimously reached very soon after the cause was submitted to the jury by reason of the convincing and clear facts of the same; that no misconduct or irregularity of any kind occurred during the trial of this cause by any of the jurors or in their presence by any one else; that he never stated to Mr. F. L. Cornwell the matters and things set out in defendant's counsel's affidavit, marked exhibit "A", which deponent has read, nor did he agree with said

17 Mr. F. L. Cornwell, nor with anybody else, to make any affidavit relative to their deliberations and proceedings.

MAN. A. TORO, *Juror.*

Affidavit No. 238. Subscribed and sworn to before me, by Manuel A. Toro, of age, married and resident of Ponce and to me personally known on this 10 day of February, 1910.

JOSÉ TOUS SOTO,
Notary Public.

Affidavit No. 4.

In the District Court of the United States for Porto Rico, Ponce.

Law. No. 242.

FEDERICO DIDRICKSEN et al.
vs.
THE AMERICAN RAILROAD CO. OF PORTO RICO.

Affidavit of Juror William L. Aguayo.

William L. Aguayo, being duly sworn, deposes and says:
That he was one of the jurors who tried and decided the above entitled cause in favor of plaintiffs; that said case was wholly and exclusively decided on the facts and evidence allowed by the Court and on the instructions received from said Court, without any extraneous matter, evidence or thing whatever having in any manner interfered with or influenced the jury; that juror Mr. C. A. Feller did not state in the jury-room or anywhere else, during the trial of the above case, "that the American Railroad Company had offered to settle with the plaintiffs for the sum of $15,000, nor for any other sum", that juror M. Toro Peralta, a school-teacher from Cabo Rojo, did not want to assess damages in this case in any such large sum as $50,000,—but wholly agreed with the verdict herein rendered; that nothing was considered by the jury in deciding the above case, but the facts and evidence allowed by the Court and the law as propounded by it, and that in this case a verdict was unanimously reached very soon after the cause was submitted to the jury by reason of the convincing and clear facts of the same; that no misconduct or irregularity of any kind occurred during the trial of this cause by any of the jurors or in their presence by any one else.

WM. A. AGUAYO.

Affidavit No. 102. Subscribed and sworn to before me, this 10 day of February, 1910, by Wm. L. Aguayo, of age unmarried, of Ponce — by me personally known.

FRANCO. PARRA,
Notary Public.

And on the 18th day of February, A. D. 1910, an entry was made upon the journal of said court in said cause, which said entry is as follows:

Entry.

Ponce Division.

242. Law.

FREDERICO DIDRICKSEN and His Wife, LUCIA DIDRICKSEN,
vs.
THE AMERICAN RAILROAD CO. OF PORTO RICO.

The motion for a new trial herein comes on for hearing as p
agreement of of counsel for the respective parties. F. L. Cor
wel- appearing in support of the motion and S. H. Belaval represen
ing José A. Poventud, in opposition thereto. At the conclusion
the arguments of counsel the Court not being fully advised tak
the matter under advisement.

And afterwards, to wit: March 15, 1910, an entry was ma
upon the journal of said court in said cause, which said entry is
follows, to wit:

Entry.

Ponce.

242. Law.

FREDERICO DIDRICKSEN et al.
vs.
THE AMERICAN RAILROAD CO. OF PORTO RICO.

On this date the Court sends to the files its opinion giving
reasons therefor and in accordance therewith it is ordered that t
motion for a new trial heretofore heard and submitted be and t
same hereby is overruled and denied.

And the same day, and year last aforesaid the opinion
19 said court denying the motion for a new trial herein w
filed, said opinion is as follows, to wit:

Opinion Denying Motion for a New Trial.

In the District Court of the United States for Porto Rico, Pon

Law. No. 242.

FREDERICO DIDRICKSEN et al.
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Plaintiffs are the parents and personal representatives of the
Pedro Didricksen. The suit is brought under the national

employers' liability act of April 22, 1908, to recover damages for alleged negligence that resulted in the injury and death of their son. The regular employment of the deceased was that of yard master or yard conductor on defendant's line of railroad, but he had at different times and for some time before the accident that resulted in his death, been engaged as conductor and brakeman of a ballast train that was working at Lajas on defendant's line. He was handling this train at the time of the injury. The accident occurred on the last day of November, 1908.

The case was tried at the January, 1910 term in the Ponce Division before a jury. A verdict was returned for plaintiffs in the sum of six thousand dollars. The issue before us is a motion for a new trial. It was argued orally but no briefs were filed. We have just read a transcript of the evidence and examined the entire record and papers. The new trial is asked for the following alleged reasons: (1) Because the verdict is against the evidence. (2) Because it has no evidence to support it. (3) Because — is — far contrary to the evidence as to shock the moral sence. (4) Because of misconduct of the jury in taking into consideration statements made by juror C. A. Teller, which prejudiced the defendant and which are more particularly set out in the affidavit attached to the motion, marked exhibit A. (5) Because the verdict is contrary to both the law and the facts, and (6) For errors of law occurring at the trial and duly excepted to by the defendant.

With reference to the fourth ground above set out, counsel for defendant files an affidavit in which he states:

"That he is the attorney for the American Railroad Company and was in charge of the defense of the above entitled action. That when said cause was submitted to the jury and after they had brought in their verdict, that three jurors stated to deponent that one of the jurors, to wit, C. A. Teller, had stated in the jury room that the American Railroad Company had offered to settle with the plaintiffs for the sum of $15,000.00 and that another juror whose name deponent does not remember, but who was a school teacher and from Cabo Rojo, wanted to assess the damages in the sum of $20,000.00. That the names of the jurors who stated the aforesaid to deponent are McCormick, Walsh and Toro, and that said jurors had agreed with deponent to make an affidavit covering said facts, but that juror McCormick informed deponent that he had consulted with the Judge and the Court had advised him not to make same and said juror McCormick communicated said statement of the Court to the other members of the jury and for that reason deponent is unable to present their affidavits".

In answer to this, counsel for the plaintiffs files the affidavits of four jurors, two of them being jurors Teller and Toro referred to above, and which are as follows:

"C. A. Teller, being duly sworn, makes oath according to law and deposes and says:

That he was one of the jurors who tried and decided the above entitled case in favor of plaintiffs; that said case was wholly and exclusively decided on the facts and evidence allowed by the Court

and on the instructions received from the said Court, without any extraneous matter, evidence or thing whatever having in any manner interfered with, or influenced the jury; that deponent has not, and did not, state in the jury room or anywhere else, during the trial of the above case, "that the American Railroad Company had offered to settle with the plaintiffs for the sum of $15,000 nor any other sum"; that nothing was considered by the jury in
21 deciding the above case but the facts and evidence allowed by the Court and the law as propounded by it, and that in this case a verdict was unanimously reached very soon after the cause was submitted to the jury by reason of the clear facts of the same; that no misconduct or irregularity of any kind occurred during the trial of this case by any of the jurors or in their presence".

"Manuel Fournier, being duly sworn, deposes and says:

That he was one of the jurors who tried and decided the above entitled cause in favor of plaintiffs; that said case was wholly and exclusively decided on the facts and evidence allowed by the Court, and on the instructions received from said Court, without any extraneous matter, evidence or thing whatever having in any manner interfered with or influenced the jury; that juror Mr. C. A. Teller did not state in the jury room or anywhere else, during the trial of the above case, "that the American Railroad Company had offered to settle with the plaintiffs for the sum of $15,000, nor for any other sum"; that juror M. Toro Peralta, a school teacher from Cabo Rojo, did not want to assess damages in this case in any such large sum as $50,000,—but wholly agreed with the verdict herein rendered; that nothing was considered by the jury in deciding the above case, but the facts and evidence allowed by the Court and the law as propounded by it, and that in this case a verdict was unanimously reached very soon after the cause was submitted to the jury by reason of the convincing and clear facts of the same; that no misconduct or irregularity of any kind occurred during the trial of this cause by any of the jurors or in their presence by any one else."

"Manuel A. Toro, being duly sworn, deposes and says:

That he was one of the jurors who tried and decided the above entitled cause in favor of plaintiffs; that said case was wholly and exclusively decided on the facts and evidence allowed by the Court and on the instructions received from said Court, without any extraneous matter, evidence or thing whatever having in any manner interfered with or influenced the jury; that juror Mr. C. A. Teller did not state in the jury room or anywhere else, during the trial of the above case, "that the American Railroad Company had offered to settle with the plaintiffs for the sum of $15,000, nor for any other sum"; that juror M. Toro Peralta, a school teacher from Cabo Rojo, did not want to assess damages in this case in any such large sum as $50,000,—but wholly agreed with the verdict herein rendered; that nothing was considered by the jury in deciding the above case, but the facts and evidence allowed by the Court and the law as propounded by it, and that in this case a verdict was unanimously reached very soon after the cause was

submitted to the jury by reason of the convincing and clear facts of the same; that no misconduct or irregularity of any kind occurred during the trial of this cause by any of the jurors or in their presence by any one else; that he never stated to Mr. F. L. Cornwell, the matters and things set out in defendant's counsel's affidavit, marked Exhibit "A", which deponent has read, nor did he agree with said F. L. Cornwell, nor with anybody else, to make any affidavit relative to their deliberations and proceedings.

The Court itself desires here to state that according to its recollection, jurors McCormick and Walsh did each call on the Court next morning after the verdict was returned and state that counsel for defendant had asked them to make an affidavit regarding occurrences in and about the trial, and wanted to know of the Court if there would be anything wrong about their doing so. Our recollection is that we told each of them, that as we remember the rule, jurors were not ordinarily permitted to attack their own verdict by affidavit, or in any other manner, but that if anything extraordinary or unusual had occurred, it might even be their duty to not only make affidavit about it for counsel, but to report the matter to the Court. One of them Mr. Walsh, was apparently proceeding to say that there was nothing as serious as that about it, when the Court being about to go on the bench, told them they had better do nothing about it until we had opportunity to look the matter up, and that we would advise them further. They did not again return to the chambers, and as the Court remained on the bench during the day, they return- to their homes without further consultation with the Court. It is therefore probable that counsel is unable to present the affidavits of said jurors for such reason However after the affidavits of counsel first aforesaid was put in the files, the affidavits of the jurors as above set out, were evidently procured by counsel for plaintiffs and speak for themselves. If such affidavits can be received at all to attack a verdict, it would seem that the matters set forth in counsel's affidavit have been fully denied as above.

Under the heading of New Trial in 29 Cyc. at pp. 982-3, it is set forth that, "It is a general rule, in most jurisdictions, that the testimony of jurors is not competent to impeach their verdict". Citations are given from twenty-four States of the Union, as well as from several of the federal courts as sustaining this doctrine. In Chicago Sanitary District v. Cullerton, 147 Ill. 385, it is stated that, "The grounds for the rejection of such affidavits have usually been, first, because they would tend to defeat the solemn act of the juror under oath; second, because their admission would open the door to tamper with the jury-men, after their discharge; third, it would furnish to dissatisfied and corrupt jurors the means of destroying the verdict to which they had assented". It is also stated in the same paragraph of Cyc. that in some jurisdictions by statue such testimony is not competent for the purpose of impeachment and is only received to show that *that* the verdict was agreed to or induced by a resort to chance. But it is also set forth in a note on page 989 of that same work that, "Affidavits of jurors

are generally inadmissible to prove declarations of other jurors in the jury room indicating prejudice, bias, or pre-judgment of the case", citing Cowls v. Chicago, etc. Ry. 82 Iowa, 575, and several other cases.

So it seems the rule is rather general, that such affidavits cannot be received for the purpose intended here, and in any event we gather from our reading of the authorities what seems to be the rule,—that wherever such affidavits are permitted to be received at all, it must be shown that the party complaining was probable prejudiced by the act complained of. The size of the verdict does not in our opinion tend to show that such was the fact here.

It appeared from the evidence adduced at the trial that the accident occurred on a side track that runs around behind the station at Lajas, one of the uses of which side track is to enable the help to supply coal to the locomotives used along the line each way from that point. The coal is piled up alongside of the track, its perpendicular front being constructed out of big chunks of coal that make it look like a rubble masonry wall. The evidence tended to show that this coal wall is so close to the track as not to afford safe room for a person to go between it and its cars standing on the track. It is also showed that deceased was coupling some cars and that just before the accident he was standing on the opposite side of the
24 track from this coal wall and signalled the locomotive driver to push the cars back to some other cars that were further along on the siding. The locomotive driver testified in substance that deceased signalled him to stop, and that he did stop, and waited for some minutes, but did not again see the deceased; that he next suddenly saw the station master going towards the place where deceased was, and so he, the witness, jumped off the engine, and went along also, and they both found the injured man on the opposite side of the track near this coal wall on the ground, and partly between the ends of the two flat cars that he had been trying to couple. It is pretty certain from the evidence that there is not room for the body of an ordinary man between the side of the car and this coal wall, but it is not so absolutely certain from all of the evidence, especially if the evidence of the witness Rodriguez next below referred to is not considered, whether deceased was injured by being caught between the drawheads or bumpers of the cars in an effort to couple the cars, or whether he had successfully accomplished that and then escaped to the outside and was caught between the side of the car and the coal wall. No person actually saw the accident occur, or if they did, they failed to state the fact at the trial. Plaintiffs called a witness named Gustavo Rodriguez who was an uncle of the deceased. He lived some distance from the scene of the accident down the line of railroad and went there on the first train, getting there ten or twelve hours after the occurrence. He testified that deceased told him as he lay on a cot at the depot at Lajas that the way the accident occurred was that there were two cars, the coupling of which did not join, and that then he had to cross over to the opposite or inner side between the coal pile and the cars so as to turn the crank rod on that side. That then the

pin fell and the engineer upon hearing that noise, started the train, and that then deceased was caught by the train and was squeezed and injured. The deceased specifically stated that he was squeezed between the coal pile and the car. That there was room for him between the ends of the platform cars, but not between the coal wall and the side of the car.

Later in the trial, on motion of counsel for defendant, and principally under authority of Insurance Co. v. Mosley, 8 Wall. 397, we took the evidence of this uncle from the jury on the ground that — was too long after the fact, and instructed them specifically not to consider it. Now after a full examination of the subject, and under all the facts of this case, we are not certain that we did right in taking that evidence from the jury, but if we erred in this it was in favor of defendant. It is certain that deceased was at that time injured unto death, as he died eight days later in the hospital at Ponce, and it may have been that his statement as to his feelings and as to how the injury occurred, made before he was removed from the depot near which the accident occurred, was so much a part of the res gestæ as that it ought to have been admitted. At any rate, it appeared impossible, otherwise than by circumstantial evidence, to prove how the occurrence took place.

Counsel for defendant strenuously contends that after we took this evidence from the jury, which he insists was proper, there was nothing left in the case to go to the jury at all, and that there ought to have been a peremptory instruction for defendant. We have examined the evidence and are constrained to dispute this proposition as to the sufficiency of the remaining evidence. A witness called by the plaintiff named Emilio Mendez, who was working at the station at the time, stated that he was coming from a field toward the station when the accident occurred; that when he had approached close to the track where this train was, he heard a noise and heard the bumpers of the cars strike each other and heard a scream or yell. That upon hearing the scream the engineer stopped the engine, and deceased fell in the middle of the track, and that afterwards the station master called two or three more peons and they with the witness picked him up, put him on a hand car and took him to Lajas. The witness states he did not notice the way the deceased was caught, but thinks he was caught between the two bumpers and against the coal pile. He identified a photograph of the coal pile as a correct representation of the coal wall there at the time.

Another witness for plaintiff named Julio Roman, who was working at the time for the railroad company at the station in question and who was on the track in front of the station at the time, stated he arrived there immediately after the accident and helped to take the injured man out or to remove him from there, and that they put him on the hand car and took him to the town. He further states that he found deceased between the ends of the two platforms of the cars near the coal pile. That his feet were touching the coal wall and his head was towards (across) the track. Then when the defense put in its own evidence, the engineer testi-

fied as before indicated, and on the whole he appeared to want to shield himself from blame for what probably was his fault.

Another witness for defendant, Ulises Cantino, was the fire man on the engine at the time, and states that the engine was on the main track and that deceased told them to go back on the siding to get some cars that were there,—to couple some flat cars; that they went in and endeavored to couple, but that the cars did not couple, and that then deceased stepped out in sight of the engine driver and signalled to stop, and that after they stopped they remained there waiting further orders from deceased, and because they did not hear more orders and deceased did not again appear, the engineer whistled as an inquiry to him, and that when he then did not answer, the engineer jumped off and saw the people pulling
27 the deceased from between the ends of the platform cars.

The station master testified that it was eight o'clock in the morning and he was in the office and heard somebody screaming and went out to the rear part of the station near a switch where they were making some maneuvres and saw the conductor (deceased) between the flat cars. Then he went towards the engineer and told him not to move further. That he and the engineer then got some help and started to move the man. That they found the deceased on the coal wall side of the track between the ends of the two flat cars. It was in evidence that these are small cars weighing about four and a half tons each. That there were four or five of them between the engine and the place where deceased was when the accident occurred. There was some evidence tending to show that these cars had automatic couplers, but there was plenty of evidence to show that they did not always couple, and we think the weight of the evidence shows that those cars have not such appliances in the way of automatic couplers as are provided for in the national law and contemplated in the employers' liability act referred to.

It was in evidence that deceased earned but forty dollars a month, and it was also in evidence that he did not give much of it to his parents; that he was somewhat dissolute to the extent that he lived illicitly with a woman and gave her a portion of his wages monthly.

This is one of the first cases tried in this district under this new national employers' liability act. The evidence showed that deceased was a healthy young man som-where between twenty-six and thirty years of age. We instructed the jury that the act is intended to be compensatory entirely. On the whole we think this instruction was right even where the father and mother are plaintiffs. Counsel for defendant contends that six thousand dollars is excessive as damages. Thirty years would not be too much to claim as the probable life of the deceased, but perharps twenty years would be as much
28 as the parents could claim any support from him. Deceased at forty dollars a month in twenty years would — earned $9,600.00 but we are not prepared to say that the low wage which this defendant is paying its train conductors is a proper criterion for the purposes of the measure of damages under this national law in this case. It is probable that if he had tried he might earn much more than that wage rate. For a father and mother to whom his

was contributing ten or fifteen dollars a month at times, to recover a verdict of $6,000.00 is not in our opinion so unreasonable as that we ought to set it aside. At any rate, because of the newness of the act in question, if any defferent rule is to obtain, we would much rather have the Supreme Court of the United States say so, than to do so ourselves. We are not prepared to go on record as saying that a verdict of six thousand dollars going to the father and mother who are poor people for the death of a son in this sort of a case is too much.

As to what actually fixes liability on defendant, we think it is the fact of the coal wall being there, and of the couplings not being of the character of safety appliances provided for by the national law. So we think deceased did not, under section four of the act in question, assume that risk of his employment, and hence that the jury were justified in finding defendant liable. It must be remembered that the negligence of his fellow servant, the engineer, if the accident occurred because of that, is not, under the act in question, any defense as it would be at common law. The place of the coal wall where it was, was the act of defendant itself.

We are therefore constrained to deny the motion for a new trial and that will be the order. All facilities to take the case up on writ of error will be afforded, as we feel that the case is one where it is advisable to have the authoritative decision of the Supreme Court of the United States.

B. S. RODEY, *Judge.*

And afterwards, to wit: March 18th, 1910, the defendant by its attorney filed in the Clerk's office of said court a petition for a writ of error and for supersedeas, which said petition is as follows, to wit:

In the District Court of the United States for the District of Porto Rico.

No. 242. Ponce.

FEDERICO DIDRICKSEN and His Wife, LUISA RODRIGUES, Plaintiffs,

vs.

THE AMERICAN RAILROAD COMPANY OF PORTO RICO, Defendant.

Damages.

To the Honorable Bernard S. Rodey, Judge of the United States District Court for the District of Porto Rico:

The petition of The American Railroad Company of Porto Rico respectfully shows that on the 12th day of January, 1910, the said United States District Court for the District of Porto Rico rendered a judgment against your petitioner a certain case wherein Federico Didricksen and his wife Luisa Rodrigues were plaintiffs and your petitioner was defendant for the sum of Six thousand dollars and

costs as will appear by reference to the record and proceedings of s
case. And your petitioner claims right to remove said judgme
to the Supreme Court of the United States by writ of error, under t
statute of the United States authorizing writs of error from t
United States District Court of Porto Rico to the Supreme Court
the United States, all which appears by the record of the proceedin
in said case.

Wherefore your petitioner prays that allowance of writ of err
returnable to the Supreme Court of the United States and for ci
tion and supersedeas; and will ever pray, etc.

F. L. CORNWELL,
Attorney for Petitioner.

And on the same day and year last aforesaid an order was ma
and entered upon the records of said court, in said cau
30 which said order is as follows, to wit:

Order Allowing Writ of Error.

In the District Court of the United States for Porto Rico.

FEDERICO DIDRICKSEN and His Wife, Plaintiffs,
vs.
THE AMERICAN RAILROAD COMPANY OF PORTO RICO, Defendan

Order Allowing Writ of Error.

At a Stated Term, to wit, the October Term, 1909, of the Distri
Court of the United States for the District of Porto Rico, Held
Chambers, in the City of San Juan, Porto Rico, on the 18th D
of March, 1910.

Present: The Honorable B. S. Rodey, District Judge.

Upon motion of Frederick L. Cornwell, Esq., attorney for defen
ant, and upon filing a petition for a writ of error, it is ordered th
a writ of error be, and it hereby is allowed to have reviewed in t
Supreme Court of the United States the judgment heretofore e
tered herein, and that the amount of the bond on said writ of err
be and it hereby is fixed at nine thousand dollars, the same to act
a supersedeas.

B. S. RODEY, *Judge.*

And the same day, to wit: March 18, 1910, a supersedeas bond w
filed by defendant in said cause, which is as follows, to wit:

In the United States District Court for Porto Rico.

(Filed March 18th, 1910.)

No. 242. Ponce.

FEDERICO DIDRICKSEN and LUCIA RODRIGUES, His Wife, Plaintiffs,
vs.
THE AMERICAN RAILROAD COMPANY OF PORTO RICO, Defendant.

Supersedeas Bond.

Know all men by these presents that we, The American Railroad Company of Porto Rico, as principal, and Luis Rubert and W. Hepp, as sureties, are held and firmly bound unto the said Federico Didricksen and Lucia Rodrigues, his wife, plaintiffs, above named, in the penal sum of nine thousand dollars ($9,000.), for the payment of which well and truly to be made to the said Federico Didricksen and Lucia Rodrigues, their executors, administrators or assigns, we do bind ourselves, our successors, executors and administrators, jointly and severally, firmly by these presents.

Signed and sealed with our seals, and dated this first day of February, A. D. 1910.

Whereas, at a term of the court aforesaid, held in the city of Ponce, Porto Rico, in the month of January, 1910, the said plaintiffs obtained a judgment against the defendant for the sum of Six Thousand Dollars damages, with costs; and whereas defendant desires to obtain a writ of error from said judgment to the Supreme Court of the United States and to supersede the execution of said judgment pending said writ of error;

Now, therefore, the condition of the above obligation is such that, if the above named American Railroad — of Porto Rico shall prosecute its said writ of error to effect and shall answer all costs and damages, in case it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

AMERICAN RAILROAD COMPANY OF PORTO RICO,

[SEAL.] By J. MERRIER, *Manager.*

LUIS RUBERT, [SEAL.]

W. HEPP, [SEAL.]

Sureties.

[Seal of U. S. Dist. Court for P. R.]

UNITED STATES OF AMERICA,
District of Porto Rico:

Luis Rubert and W. Hepp, being duly sworn, each for himself says that he is one of the sureties who signed the foregoing bond and that he is worth in visible property within this District more

than the penal sum of said bond over and above all liabilities and legal set offs.

LUIS RUBERT.
W. HEPP.

Sworn to and subscribed before me, this 1st day of February A. D. 1910.

[Seal of the U. S. District Court for Porto Rico.]

JOHN L. GAY,
Clerk of said Court.

Approved, this 18th day of March, 1910.

B. S. RODEY, *Judge.*

Date change to 18.
B. S. R.

And afterwards, to wit May 2nd, the following entries were made upon the record of said court, to wit:

23 *Journal Entry, May 2, 1910.*

No. 242, Ponce. Law.

FEDERICO DUBRICKEEN et al.
vs.
AMERICAN RAILROAD COMPANY.

Comes now F. L. Cornwell and requests and is granted thirty days additional time in which to transmit the record on appeal in this cause to the Supreme Court.

Journal Entry, May 2, 1910.

No. 242, Law. Ponce.

FEDERICO DUBRICKEEN et al.
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Comes now F. L. Cornwell and presents for the Court's examination and signature a bill of exceptions to form part of the transcript of the record on appeal in the above entitled cause. The Court after due examination signs and approves said bill of exceptions and directs that same be filed; it consists of the entire transcript of the stenographer's notes on the trial, the exception taken, etc.

And on May 2, 1910, the following assignment of errors and bill of exceptions were filed in said cause, to wit:

In the United States District Court for the District of Porto Rico.

Filed May 3rd, 1910.

FEDERICKO DIDRICKSEN and His Wife, LUISA ROSENGOLTZ,
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Assignment of Errors.

Comes the defendant, Frederick L. Cornwell, in the above entitled cause, and assigns the following as the errors committed by the court in the course of the trial and proceedings in said trial:

I.

That the court erred in overruling the demurrer of defendant to the original and amended complaint filed by plaintiff on the 28th day of December, 1908 and the 11th day of December, 1909.

II.

That the court erred in overruling the demurrer of defendant to amended complaint filed by plaintiff on January 19th, 1910.

III.

That the court erred in overruling the motion made by counsel for defendant that the juror Torruellas Cortada be excused, on the ground that the said Torruellas was a first cousin of counsel for plaintiff.

IV.

That the court erred in holding that this suit did not have to be brought in the name of personal representative.

V.

The court erred in not excusing juror who announced, after the jury had been duly impanelled and sworn, that he was the employer of plaintiff Federicko Didricksen.

VI.

The court erred in allowing the introduction in evidence of a certain document alleged to be a certificate of the District Court of Ponce showing that plaintiffs were sole heirs of deceased Pedro Didricksen, when said document showed upon its face that same was asked for and issued after this cause was at issue.

VII.

The court erred in allowing the introduction in evidence of a certain certificate of the Rector of Holy Trinity Church of Ponce, attempting to show that plaintiffs were man and wife.

VIII.

The court erred in allowing the introduction in evidence of an alleged certificate said to have been signed by the Secretary of the Municipality of Ponce, which pretended to show how and when the said Pedro Didricksen met his death.

IX.

The court erred in admitting a certain photograph taken after the alleged accident.

X.

The court erred in ruling that statements made by the deceased Pedro Didricksen after his injury and before his death were admissible.

XI.

The court erred in allowing Gustava Rodrigues to testify as to statements made by the deceased as to condition and how injury occurred hours after occurrence of alleged accident.

XII.

The court erred in permitting witness to testify about statements made by station agent at Lajas.

XIII.

The court erred in admitting in evidence a map alleged to have been made by witness Pedro Clausels long after the time of alleged accident and without showing by competent testimony that said map was a true one of place, cars, couplings and surroundings at the time of the accident.

XIV.

The court erred in admitting witness Clausels to testify as to the distance between coal pile and track at the time he made measurements for map, without showing that conditions and distances were the same as at the time the accident occurred.

XV.

The court erred in permitting witness, George S. Findlay, to testify whether the cars of train at the time of accident were equipped with automatic couplings.

XVI.

The court erred in permitting witness George S. Findlay to testify as to whether the cars on train at time of accident were equipped with air brakes.

XVII.

The court erred in holding that the Act of Congress of March [illegible] 1903, 32 Stats. 943, regarding automatic couplers, air brakes, etc.

was in force and effect in Porto Rico and binding upon defendant company.

XVIII.

The court erred in overruling defendant's motion for a peremptory instruction for a verdict for defendant.

XIX.

The court erred in permitting witness Clausels to state his opinion whether, on the grade in question, a car kicked on the said side track for a distance of seven meters could of its own impulse have slipped or run in any direction on said switch.

XX.

The court erred in overruling defendant's motion for the direction of a verdict in its favor at the close of the whole case.

XXI.

The court erred in charging the jury, against the objection and exception of defendant, in the following language, to wit:

"Now in some cases, facts speak for themselves, and there is a motto of law, a Latin motto, res ipsa loquitis,—the facts speak for themselves, as it were, or the things do. But no matter how this may be, all faults do not prove negligence. In this case the man was injured so that he died. That does not of necessity prove the negligence of defendant."

XXII.

The court erred in charging the jury against the objection and exception of defendant, in the following language, to wit:

"The right of action is given to compensate the plaintiffs for any losses that may have occurred to them from the negligence of the defendant."

XXIII.

The court erred in charging the jury, against the objection and exception of defendant, in the following language, to wit:

"However, that is a limit beyond which you cannot go, nor if you find for the plaintiffs, can you award in any sum more than those what is sufficient to compensate them for the loss they have sustained. And in estimating these damages, you may take into consideration that they are the father and mother of the deceased and the fact that they are deprived of his society and any care and consideration he might take of them, or have for them during his life.

XXIV.

The court erred in charging the jury, against the objection and exception of defendant, in the following language, to wit:

"You may also take into consideration the character of man that the deceased has been proved to —; whether he was a good, kind and

helpful son, or the contrary, and you may take into consideration his age, his health, his probable duration of life and that he contributed towards the plaintiffs' support, and their dependence,
37 if any, upon him, and the time it should continue, and the necessity that existed for them to depend on him for such assistance."

XXV.

The court erred in charging the jury, against the objection and exception of the defendant, in the following language, to wit:

"In other words, the damages you shall award must be purely compensatory because the law does not permit you to award any 'smart money' or punitive damages against the defendant for this unfortunate accident, as there is no evidence in the cause that shows that the same was maliciously brought about."

XXVI.

The court erred in charging the jury, against the objection and exception of defendant, in the following language, to wit:

"You are further instructed that under the Act of Congress of March 2, 1903, the national safety appliance act has been extended to the Territories, and I instruct you that that includes Porto Rico, and therefore it was the duty of this defendant to have had continuous brakes and automatic couplings upon their rolling stock, but that fact can have no bearing in this case unless you shall believe from a preponderance of the evidence that the absence of such safety appliances contributed to the injury or death of the deceased."

XXVII.

The court erred in charging the jury, against the objection and exception of defendant, in the following language, to wit:

"To that portion of the charge reading: Sections one and two of the safety appliance act in question read as follows:

"Sec. 1. That from and after the first day of January, eighteen hundred and ninety eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

"Sec. 2. That on and after the first day of January, eighteen hundred and ninety eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.'"

XXVIII.

The court erred in charging the jury, against the objection and exception of defendant, in the following language, to wit:

"If you shall believe from a preponderance of the evidence that the accident in question occurred because of the nearness of the wall of chunks of coal to the railway track so that it did not afford sufficient room for the help attending the trains to pass between it and the sides of the cars, then you are instructed that it was negligence for the railroad company to have put and left that wall of coal in such dangerous and negligent position."

XXIX.

The court erred in charging the jury, against the objection
38 and exception of defendant, in the following language, to wit:

"Provided that you further believe from a preponderance of the evidence that the defendant did not have the continuous brakes and automatic couplers provided for by the Act of Congress, and that the absence of the same necessarily made this man go in such dangerous position between the cars, and that he could not have seen the danger openly before him at the time."

XXX.

The court erred in charging the jury, against the objection and exception of defendant, in the following language, to wit:

"You are further instructed that if you shall believe from a preponderance of the evidence that the defendant did not have upon its said cars the safety appliances provided for by the Act of Congress, and that it was necessary for the deceased to go between the cars to couple them, then the plaintiffs are entitled to recover unless you further believe that going into such position was so dangerous as that the deceased could see it and be aware of it at the time he made the attempt to couple the cars, and that he had plenty of time and opportunity to avoid the danger had he so desired."

XXXI.

The court erred in charging the jury, against the objection and exception of defendant, in the following language, to wit:

"You are further instructed that if you shall believe from a preponderance of the evidence that this accident occurred because of the locomotive engineer starting the train while the deceased was between the cars, then such negligence is the negligence of a fellow servant and the defendant is ordinarily not liable therefor to the heirs or representatives of the deceased, unless the necessity for his so going between the cars was brought about by a failure of the defendant to have upon its cars the safety appliances provided for by the Act of Congress."

XXXII.

The court erred in charging the jury, against the objection and exception of defendant, in the following language, to wit:

"If the accident occurred through the failure of the defendant in not having the safety appliances provided for by the Act of Congress on its cars, then the deceased cannot be held to have assumed the risks of his employment, if such negligence of the defendant contributed to the injury in any way."

XXXIII.

The court erred in charging the jury, against the objection and exception of defendant, in the following language, to wit:

"In any event, even though you may believe that the deceased has been guilty of contributory negligence, that fact will not bar a recovery, but the damages which you can award must be diminished in proportion to the amount of negligence attributable to the deceased, and in accordance with the rest of these instructions."

XXXIV.

The court erred in charging the jury, against the objection and exception of defendant, in the following language, to wit:

"Therefore, if you find from a preponderance of the evi-
39 dence on the whole case that the deceased was guilty of some contributory negligence, but that the defendant was also guilty of negligence, then you must still find for the plaintiffs, but you must diminish the damages as indicated."

XXXV.

The court erred in charging the jury, against the objection and exception of defendant, in the following language, to wit:

"And on the other hand, you must not stand up so straight as to lean over backwards against the rights of these plaintiffs in the premises, and doing this, you will have done complete justice between the parties."

40 In the District Court of the United States for Porto Rico.

FEDERICO DIESTCHEIN and His Wife, LUISA ROSSEGUINI,
vs.
THE AMERICAN RAILROAD COMPANY OF PORTO RICO.

Bill of Exceptions.

Filed May 3rd, 1910.

Be it remembered, that on the 19th day of January, 1910, at the January, 1910, term of this court at Ponce, the above entitled cause came on for trial before the above court and a jury duly empaneled, Honorable B. S. Rodey presiding.

The plaintiffs appeared by Mr. José A. Poventud, their counsel, and the defendant appeared by Frederick L. Cornwell, its counsel, and the following proceedings were had and testimony taken.

The hereinafter transcript, which is made part of this bill of exceptions, constitutes the testimony and statements of all the evidence introduced and offered upon the trial of this cause with the rulings and exceptions thereto; instructions to the jury and exceptions thereto; requests for instructions, refusal on the part of Court and exceptions thereto; with the motion of the defendant for the direction of a verdict at the close of the plaintiffs' cause, order overruling same, renewal of said motion at the close of the whole evidence, order overruling same, to which said ruling of the Court, counsel for the defendant then and there duly excepted.

41 *Transcript of Testimony.*

Counsel for the plaintiffs asks leave to amend his complaint by making the following interlineation: That plaintiffs are the duly appointed personal representatives of the deceased, appointed by the district court of the Island for the Ponce District, which leave is granted by the Court, and to which action of the Court in allowing said amendment, counsel for the defendant duly objects and excepts.

Counsel for the defendant excepts to the action of the Court in refusing to excuse the juror Torruellas Cortada on the ground that he is a first cousin of counsel for the plaintiff.

The demurrer is renewed to the complaint as amended and is overruled, to which action of the Court in so overruling said demurrer, counsel for the defendant duly objects and excepts. The answer of defendant is to be considered as filed anew to the amended complaint.

Mr. CORNWELL: That amendment does not state who is the personal representative.

The COURT: I hold that that may mean more than one.

Mr. CORNWELL: Note an exception to that ruling.

After the jury was sworn to try the cause, one of the jurors announced that he is the employer of the plaintiff Federico Didricksen, on which ground counsel for the defendant asks that the juror be excused, which request is denied by the Court, and to which action of the Court, counsel for the defendant duly objects and excepts.

42 Mr. POVENTUD: I offer in evidence the declaration of the district court of plaintiffs as sole heirs and only personal representatives of the deceased, Pedro Didricksen, dictated by the district court of Ponce.

Mr. CORNWELL: Note an objection to the introduction of this document on the ground that it does not state who is the personal representative; and on the further ground that it is presented too late. At the time of the bringing of the suit, there was no personal representative, or at the time the issues were made up; and for the further reason that it shows that the action is barred.

The COURT: Overruled on the ground that the Court holds that the action is brought under the national employers' liability act of April, 1908, and that that act supersedes all local acts with reference

to railroad employees in Porto Rico, and because the limitation in said act is two years instead of one as in the superseded act of 1906.

Mr. CORNWELL: Note an exception.

The document was then placed in evidence and marked: Exhibit A for the plaintiffs.

Mr. POVENTUD: I now offer a certificate from the rector of the Holy Trinity Church of Ponce, Porto Rico, where these two people were married.

Mr. CORNWELL: I think the best evidence is to bring the
43 rector here himself, who performed the marriage. It is objected to on the ground that it is immaterial.

The COURT: It may be admitted.

The document was then placed in evidence and marked: Exhibit B for the plaintiffs.

Mr. CORNWELL: Note an exception.

Mr. POVENTUD: Plaintiffs now offer in evidence a certificate of the municipal secretary of Ponce, who is in charge of the civil registry, certifying as to the death of Pedro Didricksen on the date and in the manner therein stated.

Mr. CORNWELL: I object to this. It seems to be a statement of his death and a statement of what happened.

The COURT: Admitted only for the purpose of showing his death.

Mr. CORNWELL: Note an exception.

The document was then placed in evidence and marked: Exhibit C for the plaintiffs.

CARL VOGEL being called as a witness in behalf of the plaintiffs, was duly sworn and testified as follows:

Direct examination by Mr. POVENTUD:

Q. What is your name, doctor?
A. Carl Vogel.
Q. Where do you practice, doctor?
A. In Ponce, Porto Rico.
Q. Where did you practice in the latter part of November, 1908?
A. Ponce, Porto Rico, and I was director of St. Luke's Memorial Hospital.
44 Q. Did you happen to know about the latter part of that month of November, 1908, a man by the name of Pedro Didricksen?
A. That man was brought to the hospital on December 1st.
Q. State to the jury why he was brought to the hospital.

Mr. CORNWELL: I understand that this is a suit for his death.

Q. Did he happen to die in the hospital?
A. Yes, he died in the hospital some eight days later.
Q. In what condition did you receive him in the hospital?

Mr. CORNWELL: I object to that because if he is dead, that doesn't make any difference.

The COURT: He may just show that he was injured and died from those injuries, but the detail of it doesn't cut any figure.

Q. What was his condition or what did he have there?
A. I saw him first in the railroad station where Mr. Gustavo Rodrigues asked me to take him up to the hospital and he told me there that twenty-eight hours he was hurt already.

Mr. CORNWELL: I object to what he told you.
The COURT: You may state his condition from your examination.

A. From the condition I observed, he was badly bruised over the whole back, both sides of the pelvis, here in front and other conditions. I have to say something that he said; that he was injured for twenty-eight hours.

The COURT: No, you cannot tell that.
Mr. CORNWELL: Your Honor ruled in the Solis case that a doctor could not testify what was said between the injured party and the doctor.

15 The COURT: He may state whether he died from the injuries he received.

Mr. PROVENTUD:

Q. Doctor, did he die, in your opinion, as a consequence of the injury which he received, in the hospital?
A. Yes, sir.

The COURT:

Q. How many days after he was brought there?
A. Eight days.
Q. When was he brought there?
A. He was brought to the hospital on the first of December and he died in the afternoon of the eighth of December.
Q. What year?
A. In 1908.

Mr. POVENTUD: That is all.
Mr. CORNWELL: No cross examination.
Witness retires.

18 GUSTAVO RODRIGUES being called as a witness in behalf of the plaintiffs, was duly sworn and testified as follows:

Interpreted.

Direct examination by Mr. POVENTUD:

Q. What is your name?
A. Gustavo Rodrigues.
Q. Do you know, or did you ever know a man by the name of Pedro Didricksen?
A. He was my nephew.
Q. Do you know what happened to him, if anything, in the latter part of the year 1908?

A. Yes, sir.

Q. State to the jury what you know about it.

A. That afternoon on the 30th of November at six o'clock in the evening I received notice from one of the employees of the railroad company that my nephew had been seriously injured by the train. I telephoned to the station there.

The COURT: Don't go into too much detail. Say if you went to the station. Did you go to the station then?

A. I went there during the night and in fact I found him seriously injured.

Mr. CORNWELL: I don't understand the materiality of this. The suit is for the death under that statute.

The COURT: Exactly, we are getting to it. I don't see what we need all that detail for.

Q. Did you find the man there that was injured?

A. He was not at the scene of the accident; he had been removed.

Q. Did you examine him to see the importance of the injury?

A. Yes, sir.

47 Q. Explain to the jury what it consisted of.

A. He had all the genital organs swollen or inflamed.

Mr. CORNWELL: I object to that.

The COURT: What do you put this testimony in for?

Mr. POVENTUD: It is the statement of the man after the injury as to the nature and extent of the injury. It is what the injured man said to a relative of his a reasonable time after the injury as to his injury and suffering.

The COURT: I will hear you on that Mr. Cornwell. There is nobody living now who can tell how it happened. How is he going to prove it unless by the declarations of the man who was about to die?

Mr. CORNWELL: If he is going to show that there was nobody else present at the time of the accident, but he has not shown that yet. It is evidently the intention of counsel to prove up pain and suffering here. Any statement that the injured man made after he came to Ponce, to any of his family, would be in the nature of a self-serving declaration and could not bind the defendant in this case.

The COURT: This act is purely compensatory, and brought by the parents to compensate them for the loss they have been subjected to by the death of their son. I will hear you on the proposition whether on the same principle that a dying declaration goes in to con-

48 vict a man of murder, whether or not in the absence of any other proof, this statement of this man made to this witness at the time when he was in imminent danger of death, is proper or admissible.

Mr. CORNWELL: I never heard of that rule in a civil case.

The COURT: Have you any witness that saw the accident occur?

Mr. POVENTUD: I think there is one witness that saw the accident.

The COURT: You may ask him as to how the accident occurred, merely. Now I won't receive that if there is other evidence as to how the accident occurred.

Mr. POVENTUD: There is an eye witness but he didn't see the whole of it.

The COURT: Then take this witness off and bring the witness who actually saw it.

Witness retires.

J. B. MEDEIROS who was summoned as a witness by the plaintiffs was not called to testify owing to the following stipulation entered into by counsel for both parties:

It is agreed that the deceased, Pedro Didricksen, had been in the employ of the defendant company three years prior to the accident in the capacity of yard conductor or 'jefe de maniobras' at a salary of forty dollars a month and that he received forty cents a day additional for his expenses.

49 EMILIO MENDES being called as a witness in behalf of the plaintiffs, was duly sworn and testified as follows:

Interpreted.

Direct examination by Mr. POVENTUD:

Q. What is your name?

A. Emilio Mendes.

Q. Now can you state to the gentlemen of the jury where did you work in the latter part of November, 1908?

A. At the Lajas station.

Q. Did you know at that time a man by the name of Pedro Didricksen?

A. Yes, sir.

Q. Do you know, if anything, what happened to him in the latter part of the month of November, 1908?

The COURT: Find out if he was working for the railroad company. You haven't got that in here yet.

Mr. POVENTUD: I will bring that out.

A. Yes, sir; I was coming from the field.

The COURT:

Q. Coming from the field to the station, or where?

A. When I was approaching the track, I heard then a noise. When I heard the bumpers bump each other, I heard a scream or a yell. Upon hearing the screams, the engineer stopped the engine and he fell on the middle of the track. And then afterwards the station master called two or three more peons and then we picked him up and put him on a hand car and we took him to Lajas.

Mr. POVENTUD: State how he was caught there.

A. When the train was about to couple, I didn't notice the way how he was caught.

Q. But between what things was he caught?

50 A. Between the two bumpers at the coal bin.

The Court:

Q. Two bumpers of two cars?
A. Yes, sir; against the coal pile.

Mr. Povenstud: Ask him if he remembers the place if I show him a picture of it.

A. Yes, sir.

Q. (Handing a photograph to the witness.) Can you state after looking at this if it represents the place of the occurrance?
A. Yes, sir.

Mr. Povenstud: I offer this in evidence to illustrate his testimony.

The Court: It will be admitted to illustrate the testimony of the witness.

Mr. Cornwell: I object to it because there is no testimony to show that it is in the same condition as when the accident occurred. Note my objection and exception to the admission on the ground that it does not show the same condition as existed at the time of the accident.

The photograph was then placed in evidence and marked Exhibit D for the plaintiffs.

Q. (Showing the photograph to the witness again.) Please explain what this house is.
A. That is the station.
Q. What are these rails that run here behind the station?
A. The track that is laid at the rear of the station.
Q. What is this here?
A. That is the coal pile there.
51 Q. About where in that coal pile was that man caught?

Mr. Cornwell: I object to that on the ground that it is leading the witness.

The Court: It is leading.

The Court:

Q. Can you point out on that picture where he was caught on the coal pile?

—, ——.

Mr. Povenstud:

Q. Where on this wall, if you remember, was he caught?

—, ——.

The Court: In the middle or side or where?
A. Here and he was released here (indicating on the photograph).

The Court:

Q. Where do you say the man was caught?
A. (The witness indicates that the man was caught near where the little boy is that is nearest the station, there being another little boy down near the middle of the coal pile).
Q. And where was he carried to?
A. He was rolled along to near where the other boy is.

Q. Is that coal pile in the same direction it was when the accident occurred?
A. Just the same.

Mr. POVENTUD:

Q. And between what things was he caught there?
A. He was caught between the side of the wall and the side of the car.

The COURT:

Q. Then he was not caught by the bumpers?
A. On the side and then it turned him around.
Q. What turned him around?
A. The coal wall.
Q. Then it was not the bumpers at all but the coal wall that injured him, and the side of the car.
A. When we went there to pick him up he was in the middle of the track.

Mr. POVENTUD: That is all.

Cross-examination by Mr. CORNWELL:

Q. Where were you when you first heard that man scream?
A. Right near, close to the place.
Q. Did you see the man before he screamed?
A. No, sir; I didn't see him.
Q. Then when you first saw the man he was in between the cars, wasn't he?
A. Between the car and the coal pile on one side.
Q. Wasn't he in between the ends of the two cars?
A. No, sir.
Q. Then he was crushed by the two bumpers coming together, wasn't he, and then he fell over against the coal pile, didn't he?

Mr. POVENTUD: I object to that manner of examining the witness and stating what he did not state.
The COURT: You cannot assume what is not in evidence, but proceed along proper lines.

A. Between the two bumpers and then he was thrown to one side against the coal pile or the coal wall.
Q. Did you say you were working there at the station?
A. Yes, sir.
Q. He was the conductor of the train, wasn't he?
A. Yes, sir.
Q. He was the man in charge of the train, wasn't he?
A. Yes, sir.
Q. What were you doing there in the station?
A. When they were building the workshop.
Q. You said you were coming from some place at the time of the accident; where were you coming from?
A. From behind the station.

Q. And you were coming from the direction of Ponce towards the direction of Mayaguez?

Mr. POVERTUD: I object to that question. It has not been shown that he knows where Ponce or Mayaguez are.

Q. Well, were you coming from the direction of La Plata and were you going in the direction of Lajas?
A. I was going towards the station.

The COURT:

Q. Were you coming from the direction of the depot to the coal pile or in the opposite direction?
A. In front of the station; I was walking in front of the station.
Mr. CORNWELL: Now in front of the station do you mean, or back of the station?
A. Back of the station.

The COURT:

Q. On the same side of the station where the man was injured?
A. Yes, sir.

Mr. CORNWELL:

Q. This track is a side track, isn't it?
A. Yes, sir.
Q. And it is used there for the purpose of loading coal, isn't it?
A. Yes, sir.
Q. And all the engines back in there every day to take coal, don't they?

Mr. POVERTUD: I object to this on the ground that it is not
54 proper cross examination, and move to strike out everything to prove that it was for coal purposes, and all of that.
The COURT: That last question is stricken out, and that is all that is stricken out.

Q. What was that train doing there?

Mr. POVERTUD: I object to that.
The COURT: Yes, he has a right to show that.

A. Making train maneuvers.
Q. Doesn't that train come in there very day?
A. Yes, sir.
Q. Haven't you often seen that injured man there?
A. Yes, sir.

The COURT:

Q. How long had he been employed there?
A. I don't remember.

Mr. CORNWELL:

Q. But ever since you were working there at Lajas, he came there every day, didn't he, almost?
A. Yes, sir.

The COURT:

Q. How many months?
A. I don't remember.

Mr. CORNWELL:

Q. There was an engineer and a fireman there, wasn't there?
A. I didn't notice that.
Q. You saw the engine driver, didn't you?
A. Yes, sir.
Q. You saw the station agent, didn't you?
A. Yes, sir.
Q. And there were five or six peons more there, weren't there?
A. Yes, sir.

Mr. CORNWELL: That is all.

Redirect examination by Mr. POVENTUD:

Q. Was it after the accident that you saw those people there?
A. Yes, sir; they came afterwards.
Q. What was the name of the chief of the station, if you remember?
A. Sarrameda.
Q. And you say he came there after the accident?
A. Yes, sir; to pick him up from the middle of the track.
Q. And who else came after the accident?
A. The peons, Julio.
Q. Julio what?
A. Julio Roman.
Q. And did the engineer also come after the accident?
A. I didn't see the engineer.
Q. Now this man Pedro Didrickson, had you seen him there many times before the accident occurred?
A. Yes, sir.
Q. And was he the man engaged in coupling trains?
A. Yes, sir.
Q. You stated before that the engine started and caught him. Do you know when it stopped?

Mr. CORNWELL: That is leading.

The COURT:

Q. After the man was injured, did the train stop?
A. Yes, sir.

Mr. POVENTUD:

Q. Why did it stop?
A. On account of the screams to stop.
Q. Who screamed?
A. I screamed and another lady who was there.
Q. Did the man who was injured scream?
A. Yes, sir; he screamed once.
Q. Did you hear this fellow Pedro Didrickson blow a whistle or give any other signal to the engineer?

A. None at all.
Q. Before the accident?
A. No, sir.

Mr. POVENTUD: That is all.
Witness retires.

57 JULIO ROMAN being called as a witness in behalf of the plaintiffs, was duly sworn and testified as follows:

Interpreted.

Direct examination by Mr. POVENTUD:

Q. What is your name?
A. Julio Roman.
Q. Now where did you work in the latter part of the month of November, 1908?
A. On the track in front of the Lajas station.
Q. Do you know whether in the latter part of that month any accident occurred there?
A. By the end of that month it happened that a freight train caught a conductor that was there.
Q. When did you arrive at the place of the accident; before or after the accident?
A. After it had happened.
Q. And what did you do with the injured man if you saw him?

Mr. CORNWELL: I object to that. It is absolutely immaterial. If he is dead, that is all there is in it. He has proved by the doctor that he died as the result of those injuries.

The COURT: I appreciate the position you are taking and I also appreciate Mr. Poventud's persistence in trying to prove other facts. It is already proved by the evidence of Dr. Vogel and the death certificate that he died as the result of the injuries.

Q. What did you do with the injured man after you got there?

Mr. CORNWELL: I object to that.

The COURT: The objection is overruled. We will have to
58 make some progress.

Mr. CORNWELL: Save an exception.

A. I helped to take him out or remove him from there, and from there they put him on a hand car and they carried him to town and I returned to my work.
Q. Did you find him near the track of the railway company or in some other place?
A. Between two platforms.
Q. Was there any other thing around there next to these cars?
A. The only thing I saw around was the coal pile there.
Q. Was he near that coal pile?
A. His feet were touching against the coal and his head was towards the track.
Q. Is that all you saw of him?

A. That is all I saw.

Mr. POVENTUD: That is all.
Mr. CORNWELL: No cross examination.
Witness retires.

After considerable discussion on the question of the admissibility of the statements of the deceased before his death, the Court made the following announcement: I am going to receive this evidence on general principles. He says that he cannot prove it in any other way.
Mr. CORNWELL: He can prove it by the train crew.
The COURT: He is not obliged to use your witnesses.
Mr. CORNWELL: Note my exception.

GUSTAVO RODRIGUEZ being recalled as a witness in behalf of the plaintiffs, testified as follows:

Interpreted.

Direct examination by Mr. POVENTUD:

The COURT: Now, Mr. Witness, the Court instructs you to tell this jury,—not to go into the details of a regular story as you tried a few minutes ago, but to tell this jury what the deceased told you as to how the accident happened, that resulted in such severe injury to him. You stated that you saw him when he was suffering terribly from the injury. Now never mind about the suffering, but tell how he stated the accident happened to him.

A. He told — that he had arrived at Lajas to conduct the maneuvers together with a train that he had, a train with several cars, and he had coupled the whole train, but that there were two cars, the bumpers of which did not join on the outside and then he had to go over to the other side or the inner side between the coal pile and the cars so as to turn the crank on the other side; that then the pin fell and the engineer, upon hearing that noise, started the train and then he was caught by the train and it squeezed him and injured him.

Q. Still then you were unable to tell whether he was caught between the ends of the two cars or whether he was caught between the side of one or both of the cars and the coal bin?

A. He told me between the coal pile and the car.

Q. Then the ends of the cars or the bumpers didn't hurt him at all?

A. No, sir; they didn't reach; they were too distant, one from the other.

Mr. CORNWELL: I move to strike it out on the ground that it is hearsay testimony and that it is a self serving declaration and is not proper evidence of the accident.

The COURT: Overruled on the ground that it is manifest at this time that there was no other person present at the exact scene of the accident, and that the man at the time, as the evidence already shows, was injured unto death and only lived eight days afterwards.

Mr. CORNWELL: And another point I wish to make is that it was made in the city of Ponce several hours after the accident.

The COURT: No, it was made right there in Lajas.

The COURT: Ask him where it was made.

A. In Lajas; I was notified of the event, of the happening, at twilight and then I proceeded immediately to Lajas.

Q. How far did you have to go?

A. I left here at seven o'clock and I arrived there at half past nine. I left on the train, the only train that started for that place.

The COURT: The objection is overruled.

Mr. CORNWELL: Save an exception.

Mr. POVENTUD: Did he make that statement to you immediately upon seeing you or did some time elapse before he told you that?

A. Immediately, as soon as I arrived there, he said: Gustavo, I am dying; the train has killed me. An exclamation natural upon seeing one of his relatives.

61

Mr. POVENTUD: Now I think I am entitled to show that he was under great suffering at that time.

The COURT: There is no necessity for that at all. It is manifest that he was injured unto death.

Q. Was the man brought to Ponce?

The COURT: You have got that in already by the evidence of the doctor.

Cross-examination by Mr. CORNWELL:

Q. What time did you see him in the evening?

A. As soon as I arrived; between nine and half past nine the train arrived.

Q. Who else was present when he made you that statement?

A. There were two peons there who had been placed there by the station master to take care of him.

Q. Wasn't there a doctor present in Lajas?

A. No, there was no doctor present.

Q. Wasn't the station agent there?

A. No, sir.

Q. Now, as a matter of fact, Mr. Rodriguez, wasn't that man unconscious?

A. No, sir; when I spoke to him, no.

Q. A whole day he had been unconscious there, and they told you that didn't they?

A. What I swear positively is that he made to me that statement upon my arrival there.

Q. He lived eight days after that didn't he?

62 A. Eight days.

Q. Had his consciousness all that time didn't he?

A. Yes, sir.

Q. Do you remember who these two peons were?

A. No, sir; you don't pay attention to those things.

Q. What relation are you to him?
A. He was my nephew.
Q. I believe you are an attorney too, aren't you?
A. Yes, sir.
Q. Were you present when he told Mr. Findlay how the accident occurred, the morning after as they came to Ponce?
A. No, I was not.
Q. Didn't you come down on that train with him?
The COURT: On what train?
Q. The train that brought the injured party, Mr. Findlay and himself.
A. Yes, sir; and Mr. Findly was coming along also, but the wounded man didn't say anything there. On account of the vibrations of the train he was complaining all the time.
Q. He didn't speak to Mr. Findlay then?
A. No, sir.

Mr. CORNWELL: That is all.
Mr. POVENTUD: That is all.
Witness retires.

Mr. CORNWELL: I ask to have this last witness recalled.
THE COURT: Something you forgot, Mr. Cornwell?
Mr. CORNWELL: Yes, sir.

66 GUSTAVO RODRIGUEZ, being recalled at the request of counsel for the defendant, testified as follows:

Examination by Mr. CORNWELL:

Q. You have acted as attorney in this case and helped in preparing it, haven't you?

Mr. POVENTUD: I object to that, if Your Honor please, as immaterial and irrelevant on the ground that an attorney has the right to do that and act as a witness also.
The COURT: No question about that, but he has a right to show that with a view to determining what weight the jury shall give to his evidence.

A. No, sir; for the preparation of this suit I appointed attorneys.
Q. Didn't you act, didn't you take out the administrations proceedings and things of that kind?
A. Yes, sir; I practice in the insular courts. He was a relative of mine and I could do that.
Q. Then you went up to Lajas too didn't you to make an investigation up there?
A. Sure; yes, sir; not an investigation. I didn't go to make any investigation.

The COURT: Never mind a speech.

A. I didn't go to make any investigation, but just to find out how the accident happened and to see the scene of the accident.

Mr. CORNWELL: That is all.

Redirect examination by Mr. POVENTUD:

64 Q. (Showing the witness Exhibit D for the plaintiffs.) Can you state by looking at this picture whether it is a true representation of the place of the accident?

The COURT: The boy that was there said that it was right and there is nobody disputing that. But you may ask him.

A. It does.

Q. Did anybody of the defendant's employees show you the place?

The COURT: Stricken out; wholly immaterial. He says that represents the coal pile by the station. That is all you need.

Mr. POVENTUD: That is all.

Witness retires.

65 FEDERICO DIDRICKSEN, being called as a witness in behalf of the plaintiffs, was duly sworn and testified as follows:

Direct examination by Mr. POVENTUD:

Q. What is your name?
A. Federico Didricksen.
Q. Your name you say is what?
A. Federico Didricksen.
Q. Mr. Didricksen, where were you born?
A. Fredericksted, St. Croix, Danish West Indies.
Q. What year were you born, if you remember?
A. Born the 6th of February, 1868.
Q. Did that possession there belong to Denmark at the time you were born?
A. Yes.
Q. Are you a Danish subject.
A. Yes.
Q. Have you ever changed or renounced your citizenship?
A. No.
Q. So you still are a subject of Denmark?
A. Yes.
Q. Are you married?
A. Yes.
Q. Who is your wife?
A. She is there present; Luisa Rodriguez.
Q. Is she your only wife that you have had?
A. The only one.
Q. Did you have a son by the name of Pedro Didricksen?
A. Yes.

The COURT:

66 Q. Is this man that was injured here from which he died, your son?
A. Yes, sir.
Q. And the son of this lady too?
A. Yes, sir.

Mr. POVENTUD:

Q. He is your legitimate child?
A. Legitimate child.
Q. Now in the latter part of November, 1908, do you know where your son, the deceased, was working; for whom was he working at that time?
A. The railroad company.

The COURT:

Q. The American Railroad Company?
A. The American Railroad Company.

Mr. POVENTUD:

Q. Do you know at what place he used to work before the date of the accident that occurred to him?
A. When the accident occurred I didn't know exactly where he was.
Q. Before.
A. Before, at the station.
Q. At the station; what part?
A. At the station of Ponce; master of the yard; movements of the yard.
Q. Was he usually at Ponce or somewhere else, if you know?
A. Sometimes he would be sent out when needed.
Q. But generally?
A. He was in Ponce.
Q. Where have you lived recently and where did you live at the time of the accident, Mr. Didricksen?
A. In Ponce.
Q. And your son used to come in here every night with his train, or every once in a while?
A. No.

The COURT:

Q. What then?
A. Those days he was out.

Mr. POVENTUD:

Q. About a month before?
A. He was in Ponce.
Q. Where did he live?
A. At home.
Q. Did he live in your own home?
A. Yes.

The COURT:

Q. What was his age at the time of his death, Mr. Didricksen?
A. Twenty-five.
Q. Did he die married or was he unmarried?
A. Unmarried.

Q. Did he have any children?
A. No.
Q. Was he a healthy man at the time of his accident?
A. Yes, very healthy.

Mr. POVENTUD:

Q. Was he a fellow of a working disposition?
A. As a hard working disposition.

The COURT:

Q. How long had he been in the employ of the railroad?
A. About three years.
Q. Working steadily?
A. Yes, steadily.

Mr. POVENTUD:

Q. With his salary, or with part of it, did he ever provide you with anything or help you with anything at all?
A. Yes, he paid my rents, the house rent.
68 Q. What else?
A. The cook and light and helped his mother.

Mr. POVENTUD: That is all.

Cross-examination by Mr. CORNWELL:

Q. The year before he died had he lived at your house?
A. Yes.
Q. How much rent did he pay?
A. $12.00.
Q. How much to the cook?
A. Three.
Q. How much light?
A. Sixty-five cents.

The COURT:

Q. Per month or per year?
A. Monthly.

Mr. CORNWELL:

Q. How long had he been paying that up to the time of his death?
A. Since he was employed; all the time he was employed.
Q. During the whole three years?
A. Yes.
Q. Do you know a woman named Tomasa Rivera?
A. No.
Q. Do you know whether your son lived with her or not?
A. No.

Mr. POVENTUD: I object to that; whether a woman lived with him. That is entirely incompetent testimony here unless she was his wife. It is not necessary to show that plaintiffs were
69 dependent in any way upon the deceased at the time of his death.

The COURT: Let me see that Act. The only light in which you could ask any question like the last one,—and you can put it the other way: Is it not a fact that he has not paid anything towards the father's or mother's support or been aid to them, and so on. I don't think it is proper for you to go into that other matter save for the purpose of showing that he was spending all of his money in that way. Reading from the Act: "Shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee". There is where the question of dependency comes in first.

Mr. CORNWELL: Your Honor instructed that way in the Birch case.

The COURT: If I did, I erred.

Mr. CORNWELL: Your Honor did instruct that way. We expect to show that he maintained an independent home and that he did not even live with his parents.

70 The COURT: I will let you ask the question as to what extent he contributed, and if as a matter of fact he did not maintain another establishment. I will determine before the end of the case and on the final instructions to the jury I will settle the law of the case, and for fear of the Court ruling that it is compensatory merely, even as to the father and mother, I will let it in now so that we will have the evidence if we need to use it. You may ask the question but you will not be permitted to go into details.

Mr. POVENTUD: Counsel for the plaintiffs objects on the ground that under section two of the employers' liability act of 1908, plaintiffs did not need to depend on deceased for support. Save an exception.

Q. As a matter of fact, at the time of the death of your son, didn't he maintain a separate establishment or home?

A. No, not to my knowledge.

Q. Now at the time of his death were you living in Ponce or out on some plantation in the country?

A. My dwelling is in Ponce but I work outside.

Q. You have had steady employment at the time?

A. No.

Q. At the time of his death or up to that time, hadn't you had steady employment?

Mr. POVENTUD: I object to that.

The COURT: He may get that in because it may be very material.

71 Q. Weren't you employed at the time of his death as a mayordomo on a plantation?

A. No.

Q. What were you employed at?

A. A carpenter.

Q. Have you a shop here in Ponce?
A. No.
Q. You work by the day then or do contracts?
A. By the day.
Q. What do you gain a day?

The Court:

Q. How much do you make a day, Mr. Didricksen?
A. According to the importance of the work.
Q. Well, do you get good mechanic's wages in the community?
A. Sometimes, and sometimes not.

Mr. Cornwell:

Q. Have you any other children, Mr. Didricksen?
A. Yes.
Q. How many?
A. Two.
Q. What are their ages?
A. They are young.
Q. How old are the two children?
A. Eighteen years old.
Q. Boys or girls?
A. Boys.
Q. Are they working?
A. Yes, they are working but what they gain don't maintain them.

The Court:

Q. Are they living at home?
A. Yes, sir.
Q. Then your family consists of yourself and wife and two boys?
72 A. Yes, sir.
Q. One is eighteen and how old is the other?
A. The same age.
Q. Twins?
A. Yes.

Mr. Cornwell:

Q. During the last year before his death didn't your son live away from home the most of the time?
A. No.
Q. Did he contribute to the payment of the rent and light and water and cook?
A. He paid it himself.
Q. During the whole three years he was with the railroad?
A. He paid the rent, cook and lighting.

The Court:

Q. How much did it amount to per month altogether, Mr. Didricksen? Twelve dollars you said for the rent. How much for the cook?

A. Three.
Q. And for the other item?
A. The light is sixty-five cents and in addition to that he helped his mother.
Q. How much did he help her?
A. According to her needs.
Q. Have you knowledge of how much he helped her from time to time?
A. No, but when I am out of work he contributed to the support of the house.
Q. When you were out of work?
A. Yes.

Mr. CORNWELL:

Q. In addition to paying the rent?
73 A. Yes, in addition to paying the rent.

The COURT: Is that all, Mr. Cornwell? I think that is all you are entitled to now.
Mr. CORNWELL: That is all.
Witness retires.

PEDRO CLAUSELS, being called as a witness in behalf of the plaintiffs, was duly sworn and testified as follows:

Direct examination by Mr. POVENTUD:

Interpreted.

Q. What is your name?
A. Pedro Clausels.
Q. What is your occupation and how long have you practiced?
A. Civil engineer; as engineer only two years and as surveyor a long time ago.
Q. How many years?
A. Ten years.
Q. Did you at any time in the year 1908 make a certain plat or map of the back of the railway station at Lajas, Porto Rico?
A. Yes, sir.
Q. Where a certain accident occurred?
A. Yes, sir; at that place.
Q. Of a man named Didricksen?
A. I don't know the man.
Q. Was it any of defendant's employees who told you that
74 the accident had occurred there?
A. The station master.
Q. (Showing a plan to the witness) Mr. Clausels, can you state to the court and the jury whether or not this is the plat you drew of the place?
A. Yes, sir; this is the plan.

The COURT:

Q. Is it drawn to a scale?
A. Yes, one by two hundred and one by one hundred.

Q. What date was it made?
A. In December, 1908.
Q. Was there a coal heap there at the station at that time?
A. Yes, sir.

Mr. Povestud:

Q. Does that map show the distance from the track that this coal wall stood?
A. Yes, sir; all the distances are shown on the plan.
Q. Show us where the coal wall was.
A. Here is the coal bin or the coal pile (indicating on the plan).

The Court: Do you offer it in evidence?
Mr. Povestud: Yes, sir.
Mr. Cornwell: We object to it on the ground that it has other things on there to show cars and there is nothing to show that they were the cars that were there at the time of the accident and that they had the same dimensions.
The Court: You may examine him fully about that first then before you offer it even.

Q. What are these other three sketches you have got on there?
A. They represent the cars so as to show the distance be-
75 tween the coal wall and the car.
Q. And how much was it?

Mr. Cornwell: He has not shown that they are the same cars that were there at the time of the accident.
Q. Do you know whether these are the same cars that were there at the time of the accident?
A. They are the same, according to the statement of the station master.

The Court: That won't do.
Mr. Povestud: That is an admission of an officer of the corporation.
The Court: I guess that would be all right.
Mr. Cornwell: Note my exception.
The Court: Offer it now.
Mr. Povestud: Yes, I offer it in evidence.
Mr. Cornwell: It is objected to upon the ground that the map has on there improper representations of cars which it is shown were not the cars that were there at the time of the accident.
The Court: Overruled on the ground that an agent of the defendant said these cars represented on this sketch are the same as the cars used at the time of the accident.
The witness explains the map in front of the jury.
The Court: The witness has testified that this sketch in the southwest corner of the map represents the coal heap referred to and
that the middle picture or sketch of a car represents the
76 upright wall of the coal heap and a car standing opposite it.
Q. Please show the jury on this map where the station at Lajas

A. This is the Lajas station; that is the sidewalk or the platform and that is the coal pile and that is the track and this shows the car (indicating). The distance between the coal pile and the car at point A is a meter and 12 centimeters to the nearest rail. At this point where the man was caught——

The Court:

Q. How do you know the man was caught there?
A. Because there are some indentations on the wall.

The Court: That will be stricken out because you were not there and you cannot tell where he fell.

The Court: Tell the distance at these different points and the jury will be the judges of that.
A. At this point (indicating) there are 89 centimeters.
Q. Between the rail and the coal?
A. Yes, sir; between the coal and the rail.

A Juror:

Q. The distance from the car to the wall is what?

Mr. Cornwell: That is objected to on the ground that it is immaterial whether it was close or far. It was a switch there for the purpose of loading coal. The evidence shows that. It is absolutely necessary in order to put it in the wagon that it should have been alongside; and on the further ground that there is no evidence to show that it was in the same condition when he measured it as it was at the time of the accident.
The Court: Overruled.
Mr. Cornwell: Note an exception.

The Court:

Q. How soon after the accident was this map made?
77 A. Twenty or twenty-one days.

Mr. Povenstud: Now, Mr. Clausels, at this point where the coal pile begins, and the edge of the car, how much did you say that was?

Mr. Cornwell: Note an objection on the ground that it is immaterial and note an exception.
A. Fifty centimeters.
Q. At point A to the edge of the screws there?
A. Forty-eight; two centimeters less.
Q. Now at point B what is the distance?
A. 81 centimeters.
Q. And between the coal pile and the edge of the screw there?
A. Twenty-nine.
Q. And from the coal pile to the nearest rail?
A. 93 centimeters.
Q. Now at point C?
A. 89 centimeters.
Q. And to the edge of the screw?
A. 25 centimeters.

Q. How long is the coal pile to the end of the second car?
A. Seven meters, more or less.
Q. Did anybody state to you there where the man fell?

The Court: I don't believe I will permit that.
Mr. Povedtud: I take an exception to that.

Q. What is the height of this coal pile?
A. At this point at the corner, two meters, and at point B, 2.40; at point C, 2.75.

The Court:

Q. Well, does it approach up the side of the car as high
78 as it is indicated there?
A. Yes, sir; it is on a scale one to one hundred.

Mr. Povedtud:

Q. What is the distance between the station here and the coal pile?

The Court: Q. How is that material?

Q. How is that material?
Q. Where is the main track?
A. That one running along there (indicating).
Q. And this side track over here, where does it connect?
A. Further down.
Q. But does it go right behind the Lajas railway station?
A. Yes, sir; the station is here and the track runs and joins further down.

Mr. Cornwell: I wish now to make a motion to strike out the testimony of this witness as to the distance of the coal pile from the cars for the reason that plaintiffs' own witness testified that he was hurt between the cars and not between the coal pile and the cars.

The Court: Overruled.
Mr. Cornwell: Note an exception.

Q. (Handing a photograph to the witness) Now by looking at this picture, Mr. Clausels, can you tell whether that is a correct representation of the place that you have mapped out?
A. Yes, sir; and these points indicate the letters which I have marked on the plan.

The map in question is placed in evidence and marked: Exhibit E for the plaintiffs.

Q. (Handing the witness another photograph) Will you look at that and state what it represents?
79 A. That is to indicate the position of the car with reference to the coal pile.

The Court: Do you offer it?
Mr. Povedtud: Yes.
The Court: Show it to Mr. Cornwell.
Mr. Cornwell: It is objected to because there is nothing to

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show that it is the same car or a car of the same dimensions or that the coal pile was of the same dimension.

Mr. POVENTUD: I will show that they are the same. I promise to connect it.

Mr. CORNWELL: Note an exception.

The photograph in question was then placed in evidence and marked: Exhibit F for the plaintiffs.

Q. Can you tell who took that picture?

A. I did.

Q. Did you take that the same day that you went there to draw up that plan?

A. The same day.

Q. So the conditions in this picture are the same as in the plat you drew?

A. Yes, sir.

Q. Please state what this represents (indicating on the photograph).

A. The place where these indentures or scratches appear.

The COURT: I won't let that in.

Mr. POVENTUD: I take an exception to that.

The COURT: I think I erred a while ago in letting that in as to the station master.

Cross-examination by Mr. CORNWELL:

Q. Do you know how many engines take coal from that coal pile daily?

A. I don't know it.

Q. Then you don't know that that coal pile is the same coal pile that was there at the time of the accident, do you?

A. No, sir; the station master told me that it was the same.

Q. I didn't ask you what the station master told you, but I asked you what you knew.

The COURT: It is manifest that he didn't know.

Q. These cars that you have got on the map, are they the cars that crushed Didricksen?

A. The station master told me that they were of the same class.

The COURT: That is all he knows about it.

Mr. CORNWELL: I move that the map be excluded as the witness has shown that he doesn't know them to be the same wagons and the witness has shown that he doesn't know that the coal pile was in the same condition.

The COURT: If those are not the same, of course you can argue that.

Mr. CORNWELL: It is not a question of argument because he has not said that they were coal cars.

Q. Were those coal cars that you measured?

A. I don't know what they use those cars for.

Mr. CORNWELL: The proposition is, Your Honor, that there is a

pile of coal there, really it is a division point on the road; every engine that passes that place takes coal there and the coal pile
81 changes every time an engine comes in there. They haven't shown that the pile was in the same condition. They can't introduce another coal pile that was there twenty-two days later.

The COURT: I suppose they cannot make all their case at once.

Mr. POVENTUD: I submit that it has been shown. We have the boy who testified where the man was picked up.

Mr. CORNWELL: You cannot show the condition of a thing that has been changed.

The COURT: Mr. Cornwell, we are trying to try this case legitimately.

Mr. CORNWELL: That is what I want to do.

The COURT: If they don't make out a case against you, I will instruct for you, and if they do, you have got to defend against it.

Mr. CORNWELL: Save an exception to the ruling and also to the remarks of the Court.

Witness retires.

82 GEORGE S. FINDLAY being called as a witness in behalf of the plaintiffs, was duly sworn and testified as follows:

Direct examination by Mr. POVENTUD:

Q. What is your name, Mr. Findlay?

A. Geo. S. Findlay.

Q. In November, the latter part of November, 1908, what position did you hold with the defendant company?

A. Superintendent of Transportation of the Southern Division.

Q. Mr. Findlay, can you state to the Court and gentlemen of the jury whether or not the defendant company uses automatic couplers on its trains and cars?

A. They do.

Q. What kind are they?

A. The name is Gould.

Mr. CORNWELL: I object to that. That is immaterial.

The COURT: I have about determined that the national safety appliance act by its very terms applied to Porto Rico, but anyway the question of whether or not a railroad in Porto Rico uses automatic couplers can go to the jury with a view to determining whether a railroad furnishes a safe place for its employees to work in, and for that reason I am going to permit it. I will let the evidence in.

Mr. CORNWELL: Note my exception.

Q. Now, Mr. Findlay, what kind of automatic couplers are these that you used in Lajas?

A. Regular automatic couplers that are used on every single car
83 that is in the employ of the railroad today.

Q. I mean on that day.

A. That day.

Q. Those cars there had automatic couplers?

A. Yes, sir.

Q. What do you mean? How do you couple them?

A. Explaining an automatic coupler, it is a coupler which differs from the old system of lock and pin which no doubt we are all familiar with. Formerly our cars had a system of a hook and an eye, but they were all taken off and substituted by the Gould automatic coupler.

Q. Does it need the assistance of a man to put the lock pin in?

A. No, sir.

Q. Does it couple by impact?

A. Yes, sir.

Q. That day, is that the kind of cars that you had there?

A. Yes, sir.

Q. Do you have them at the Ponce railway station now?

A. Yes, sir.

Mr. POVENTUD: I submit for the inspection of the Court and jury the cars down here at the Ponce station.

Q. You say they have a pin?

A. Yes, and from that pin, a lock pin located in the center of the coupling is a chain hooked on to the bar going out to the outer edge of the car.

Q. Just like this (showing the witness the plan which is in evidence)?

A. But you only show one end of the car there. You always show the same end of the car. On one end the lifting bar is located on the left hand side and on the other car it is located on the right hand side.

Q. So they are opposite?

A. Yes, sir.

Q. In order to operate them don't you need a man to work it?

A. Not necessarily; it all depends; if both couplings are locked.

The COURT: That is all immaterial. Ask him the question whether or not it is necessary to go between the cars to couple them.

Q. Is it sometimes necessary to go between the cars to couple them?

A. Sometimes it is.

Q. So it is not an appliance that is always ready to couple by impact?

A. Not always.

Q. Why?

A. Because when both couplers are locked they will not couple by impact. The tongue of the draw bar has to be open in order to receive the locking device on the other car. It is simply a movement of lifting that bar.

The COURT: We have got that fully.

Q. And that is the kind of cars that you had there at the Lajas station at the time of the accident?

A. Yes, sir.

Q. Do you know whether that train and the locomotive had continuous brakes?

Mr. CORNWELL: I object to that as immaterial.

The COURT: The safety appliance act provides for air
85 brakes as well as automatic couplers.

Mr. CORNWELL: Save an exception.

Q. Do you know whether those cars had any grab irons at the sides and ends of the car?

Mr. CORNWELL: Those things have got to contribute to the accident.

The COURT: That is true. It is stricken out.

Mr. POVENTUD: Note an exception.

Q. Now, Mr. Findlay, so on that day those two cars that were being coupled there behind the Lajas station, one of those handles was towards the side of the wall and the other towards the outside.

A. They had to be.

Cross-examination by Mr. CORNWELL:

Q. Mr. Findlay, in order to couple those cars was it necessary for that man to go between them?

A. Well, yes, it all depends on the condition; if they were both locked, he would have to go in and lift out the lock pin.

Q. You have worked on railroads in the States?

A. Yes, sir.

Q. What systems of automatic couplers have they on those railways?

Mr. POVENTUD: I object to that.

The COURT: Ask him the question direct, whether they are the automatic couplers recognized by the railways in the States.

Mr. POVENTUD: Save an exception.

A. They are practically all on the same plan generally,
86 save that they may be a different kind of patent, but they all work on the same principle.

Q. And on all of them they sometimes have to go between the cars to arrange the coupler?

A. Yes, sir.

Q. This is practically the same coupler that is used on the Pennsylvania Railway today isn't it?

A. Yes, sir.

Mr. POVENTUD: I make a motion to strike the last answer and it is denied and I except.

Q. Who was in charge of that train?

A. The deceased, Didricksen.

Q. Who alone had authority to stop and start that train?

Mr. POVENTUD: I object to that. It is not proper cross-examination.

The COURT: Sustained.

Q. What is the general authority of a conductor over a train on the American Railroad?

Mr. POVENTUD: I object to that.
The COURT: He only examined him about the automatic couplers.
Mr. CORNWELL: Note an exception.
The COURT: Use Mr. Findlay yourself when you get to your own side of the case.
Mr. CORNWELL: That is all.
Witness retires.

87 *Statement Dictated by the Court in Chambers.*

Whereupon the defendant by its attorney moves the Court to instruct the jury to find in favor of the defendant, and the Court having heard counsel on the respective sides for and against said motion, and being fully advised, denies the same. To which action of the Court, the said counsel for the defendant then and there duly objects and excepts. Thereafter the said counsel for the defendant moves the Court to strike out all of the evidence of the witness Gustavo Rodriguez as to what the deceased told him some ten or twelve hours after the accident and at a different place from where it occurred, and the Court in like manner hears the counsel for and against said motion, and thereupon grants the same and thereupon instructs the jury that they are not to consider the evidence of the said witness with reference to the statements of the deceased to him made at a different place from where the accident occurred and some ten or twelve hours thereafter, as to how the same occurred, and that the same must not be given any weight or consideration in their deliberations. To which action of the Court, counsel for the plaintiffs then and there duly objects and excepts.

Thereupon counsel for plaintiffs calls attention to the Act of March 2, 1903, 32 Stats. 943, regarding automatic couplers and brakes and extending the application thereof and of all of the acts of which it is an amendment, to the Territories and the District of Columbia, and contends that such language carries the same to Porto Rico, but counsel for defendant contends that the original act applying only to interstate commerce, the amendment of 1903 in question could not carry it to Porto Rico where there is no 88 interstate commerce in the intrastate sense and because the jurisdiction is not a Territory. And the Court hears the respective counsel on this contention and being advised, overrules the motion of counsel for the defendant and holds that Porto Rico for the purposes of such acts is a Territory, and furthermore, that the evident intent of the Act of March 2, 1903, 32 Stats. 943, supra, is to carry it to the Territories and to include Porto Rico. To which action of the Court, counsel for the defendant then and there duly objects and excepts.

Statement of the Court to the Jury upon the Opening of Court.

Gentlemen of the Jury: The Court and counsel have been in conference over the law of this case at great length and have determined one or two points of law that it is my duty now to instruct

you on. The evidence of this man Gustavo Rodriguez, the uncle of the deceased, as to what the deceased told him as to how the accident occurred, ten or twelve hours after it occurred and at a different place from where it occurred, is taken from you. It was absolutely illegal for me to let that to you and you must not consider it.

The statements of the station agent to the engineer that this was the particular place where the accident occurred, are also taken from you. It was error in the Court to have let that to you also.

The statement of the boy that the photograph represents the coal wall as he saw it and the statement of the engineer that he took that photograph at the time he made the general survey, are left with you. That is proper for you to consider. But you will not permit the questions that the Court has stricken out here to influence your verdict in any way, gentlemen.

Testimony for the Defense.

GEORGE S. FINDLAY being recalled as a witness in behalf of the defendant, testified as follows:

Direct examination by Mr. CORNWELL:

Q. What is your name?

A. George S. Findlay.

Q. In December and November of 1908, what position did you occupy, if any, with the American Railroad Company?

A. Master of transportation of the southern division.

Q. Do you remember an accident that occurred about that time where a man by the name of Pedro Didricksen was injured?

A. I do.

Q. What position did Mr. Didricksen occupy with the company at that time?

A. Yard conductor.

Q. As part of his occupation did he run on the division between Ponce and Mayagues?

Mr. POVENTUD: I object to that. There was a record admitted here to show that he was a yard conductor; they cannot contradict that.

The COURT: This does not tend to contradict it. Proceed, answer it.

A. The man was yard conductor at Ponce station.

Q. During the months of October and November was he doing any special work?

A. He was employed as conductor of the ballast train working in Lajas.

The COURT:

Q. Was that the train that was there and that he was handling at the time of the accident?

A. Yes, sir.

Mr. CORNWELL:

Q. How long had he been handling that train at Lajas before the accident?

A. They were doing some constructing at Lajas and it was uncertain work; sometimes they would work for a week and lay off for a week and other times work for a couple of weeks and lay off. He was employed in that particular run as far back as October, 1908.

Q. As part of his duties was it necessary for him to enter that side track every day?

A. It was.

Q. Who was in charge of that train on which he was conductor?

A. He was as conductor.

Q. Could that train stop or start without his orders?

A. No, it could not.

Q. What kind of couplers have all these cars?

A. Automatic couplers.

Q. Explain, Mr. Findlay, what that device was used for; that switch.

A. That was a switch running back of the——

Mr. POVENTUD: He testified already as to the automatic couplers.

The COURT: Why should you object to his making his case? He desires to ask him what that switch was used for. It is a proper thing to show in the case.

Mr. POVENTUD: We except to that.

A. The track was a track leading back of the station on which was placed and taken from the cars just like any loading
92 track of cars arriving and leaving from the Lajas station.

Q. Was the coal yard there?

A. The coal yard was there, yes.

Q. State why the coal is stacked along the side of the track, if you know.

A. The coal was stacked there principally for storage for use of engines working out of that point when our business required engines there.

Q. State whether or not coal was taken from that place every day.

A. That same engine that worked there on the ballast train remained there over night and was compelled to take coal from that stack every day for its regular supply.

Q. (Handing a map to the witness.) What is this, Mr. Findlay?

A. That is a map of the work of the Lajas station.

The COURT:

Q. You mean of the situation there?

A. Yes, sir.

Mr. CORNWELL:

Q. It is the official map of the company drawn to scale?

A. Yes, sir.

Q. And shows the main track and the switch?

A. Yes, sir.

The Court:

Q. Do you know that is correct from examining it, Mr. Findlay?
A. Yes, sir.

The Court: Do you offer it?
Mr. Cornwell: Yes, sir; it is offered in evidence. It shows the station and the coal yard of Lajas.
The Court: Any objections to its admission?
93 Mr. Poventud: Yes, we object to it on the ground that it tends to confuse. It doesn't represent exactly the place in question but a whole lot of other things.
The Court: It will be introduced in order to show the place in question. Admitted as being a map of the scene of the accident.
Mr. Poventud: We except to that.
The map in question was then placed in evidence and marked: Exhibit A for the defendant.
Mr. Cornwell: I will not take up the time to explain it to the jury. It is drawn to scale and explains itself. It is marked with letters and there is an index and by referring to that you can find what each thing means.

Q. How soon after the accident did you arrive there, Mr. Findlay?
A. I didn't arrive at the scene at all.
Q. Didn't you arrive at Lajas?
A. I arrived at Lajas the following morning.
Q. Was the injured man still there?
A. I don't remember whether he was there or not.
Q. Didn't you come to Ponce with him?
A. I came as far as Santa Rita with him.
Q. You spoke to him?
A. I did.
Q. What did you ask him?
A. I simply asked Didricksen what his general condition was.
Q. Did he give any statement of how the accident occurred?
94 A. No, sir.
Q. How long had Mr. Didricksen been a conductor on that line?
A. About two and a half years.
Q. Was he familiar with working automatic couplers?
A. Oh, yes.
Q. Mr. Findlay, you know the location of the train; how it was located at the time of the accident.
A. No, sir.
Q. Well after the train had backed in there and was headed towards San German, on what side with reference to the coal pile would the engineer be in the cab?
A. The engine being headed towards San German?
The Court: That is away from Ponce.
A. Away from Ponce, the engineer would be on the other side from the pile of coal.
Q. He would be on the same side of the engine as the coal or the opposite side?

A. On the opposite side.

Mr. CORNWELL:

Q. Now in giving signals for starting and stopping of trains, on what side of the train must the employee who does that work be located?

A. The engineer is the only one to receive and comply with orders of the conductor, and the instructions are that the conductor must be on the side of the engineer to give signals to the man who has control of the engine.

The COURT:

Q. Then you mean from your former statement to intimate that this man who was killed ought to have been on the other side from where he was to give any signal to start or stop, when he
95 was killed?

A. Yes, sir.

Mr. CORNWELL:

Q. If he had been on the other side would he have been violating any instructions of the company?

The COURT: That is matter for the jury.

A. The instructions are that he must be on the side of the engineer.

Q. As a part of his duties in the position he occupied with the company he was familiar with those rules and regulations?

A. Absolutely; he would not have been appointed conductor unless he had been.

Q. Outside of the fact while he was working up there on that ballast train, has it been necessary for him to go to that place many times during his employment?

A. I think it would be well if I should explain exactly what his duties were, shortly and quickly.

The COURT: No, Mr. Findlay, just answer that question.

A. It was.

Mr. CORNWELL: Your witness.

Cross-examination by Mr. POVENTUD:

Q. You said, Mr. Findlay, he was employed at Ponce.

A. At that time, yes.

Q. Now what do you mean exactly by 'jefe de maniobras'?

A. 'Jefe de maniobras', the literal translation of it to English is yard conductor.

Q. Now yard conductor, what does it mean?

A. Taking care of trains arriving and departing from the
96 terminal; making them up.

Q. How long was he before being in Lajas at that time, yard conductor at Ponce?

A. He was appointed yard conductor in the early part of 1907, being transferred from a cane conductor to yard conductor.

Q. Making up trains?

A. Making up trains and extra conductor at Ponce. That same conductor was the conductor for all Fortuna trains and Ponce playa trains.

Q. You say coal was taken from that coal pile by all the engines, where did they take the coal from?

A. From that pile.

Q. From what part of it?

A. Either side; we had two different piles; one on the north side and one on the south side.

The COURT:

Q. Which side was this?

A. It was on the north side towards San German.

Mr. POVENTUD:

Q. On this side next to the rail, do you know whether anything had been taken from that?

A. That I cannot say.

Q. You cannot tell from the side of the rail just as it appears in the picture; you cannot state whether anything has been taken from it?

A. No, sir.

Q. You have not been to the scene of the accident?

A. Oh, yes.

Q. Right after the accident?

A. The following day.

97 Q. Right to the track there?

A. Yes, sir.

Q. Now did you see that engine taking coal there that day? Do you know it specifically?

A. I have seen that engine taking coal other days; the day in question I did not.

Q. You don't know whether it was there taking coal the day in question?

A. No, I was not there.

Q. Now is that coal pile there still even today?

A. Yes, sir.

Q. Now can you tell us who drew that map of the company there?

Mr. CORNWELL: It is marked on the map.

A. Mr. Vinel.

Q. Now do you know personally of your own knowledge whether that map is correct or not as representing that place? Could you swear that it is a true representation of it as drawn by somebody else?

A. Yes, sir.

Q. Of your own knowledge?

A. Yes, sir; of my own knowledge.

Q. Now what is this thing marked J here?

A. It is explained here; houses for employees.

Q. And you know it because you see it written down here?

A. No, because I know the exact location.
Q. Where is the station on this map?
A. Right here (indicating).

The COURT: That is an official railroad map. There isn't one chance in a million but what it is correct.

98 Q. Where is the side track in question?
A. Here (indicating on the plan).
Q. And the main track?
A. Two main tracks (indicating).
Q. And here is where the accident occurred on the side track?
A. Yes, sir.

The COURT:

Q. Is that the map that is filed with the authorities of Porto Rico as the locus of your line?
A. I cannot state as to that. I cannot testify that it is That is an official map.
Q. It is the one that the government knows the location of your line by?
A. It probably does; I cannot state whether the government has a copy of that map.

Mr. POVENTUD: We move to strike that map out as not being made by the man to illustrate whose testimony it was presented by the defendant and offered in evidence.
The COURT: Overruled because it is testified that the map is an official one of the railroad and the railroad is a public corporation, and the witness has testified that he knows the locus, and it is a correct map. No injury can occur to you by having that map in evidence.
Mr. POVENTUD: Note an exception.
Witness retires.

99 JOSE ORTIZ being called as a witness in behalf of the defendant, was duly sworn and testified as follows:

Interpreted.

Direct examination by Mr. CORNWELL:

Q. What is your name?
A. José Ortiz.
Q. On November 30, 1908, where were you working?
A. With the railroad company.
Q. Do you remember an accident that happened to Pedro Didrickson that morning back of the Lajas station?
A. Yes, sir.
Q. What were you doing there? What position did you occupy with the railroad?
A. We went there to couple some cars.
Q. What were you, the engineer?

The Court:

Q. What position did you have in connection with the train?

A. Engineer.

Q. Engineer of the train that was involved in the accident with this man?

A. Yes, sir.

Mr. Cornwell: Explain what happened, in your own language.

A. Upon our arrival there when we left the main track to back into the side track to couple some cars that were there, we coupled the first cars and upon coupling the first car he made me a signal to back in to couple some other cars that were further down.

Q. Well, state what happened.

A. I suppose that the two cars did not couple when they came together, the cars became somewhat separated and then he
100 ordered to stop.

Q. What did you do?

A. I remained at a standstill, and in view of the fact that some minutes had elapsed and I didn't see him, I saw that the station agent had proceeded towards the car and upon seeing the station master I jumped off the engine to see where he was going, because I saw that he was not making any signals to me or anything of the kind. He was between the two platforms of flat cars when the master of the station was removing him or taking him out.

The Court:

Q. Did you go up there and see it at the moment he was taking him out?

A. When I saw that the station master was going towards the cars, I then jumped off the engine and went there.

Q. Was the man in between the ends of the cars or between the cars and the coal pile?

A. Between the side of the car.

Q. Let us understand. Was he between the side of the car and the coal pile or was he in between the ends of two cars?

A. Between the coal pile.

Mr. Cornwell:

Q. When he gave you the signal to stop, on what side of the train was he?

A. On the right hand side.

Q. Is that the same side as the coal pile?

A. No, sir.

Q. As soon as he gave you that signal, did you stop?

A. Immediately.

Q. If you know by the physical condition of the track and
101 the surroundings, how the accident happened, please state it.

A. Yes, sir.

Q. Is that track on a down grade there?

Mr. Foverud: That is matter for a professional witness.

The Court: No, any man that has sense enough to run an engine can tell that.

Mr. POVENTUD: We save the point.

A. A small grade there.

Q. When that engine pushed those cars back did they come down again by the force of gravity?

A. Yes, sir.

Q. Was that the condition there?

The COURT: Tell how much of a grade there was there and let the jury judge whether it was enough out of the level to do that.

Mr. CORNWELL:

Q. Was that grade sufficient for the cars to come back again when they were bumped up the line?

Mr. POVENTUD: Objected to and objection overruled and exception taken.

A. A little; yes, sir.

Q. State when was the last time that you saw the conductor before the accident.

A. When he signalled me to couple or join the cars.

Q. Didn't you see him after that?

A. No, sir.

Q. And at that time where was he?

A. Towards the right side.

Q. And that is the side away from the coal pile?

A. Yes, sir.

102 The COURT: I want to ask a question there for the benefit of the jury.

The COURT:

Q. How then did he get to the other side of the car, if you know, as you say he was found injured on the other side?

A. I don't know.

Mr. CORNWELL:

Q. Couldn't he have coupled the cars from the right side?

Mr. POVENTUD: I object to that.

The COURT: He may ask that. That is a very proper question.

Mr. POVENTUD: As a matter of fact, that is immaterial in this case.

The COURT: No, it is not. It is material on the question of whether he contributed to any extent to his own injury here.

A. Yes, sir.

Mr. CORNWELL: That is all.

Cross-examination by Mr. POVENTUD:

Q. As a matter of fact, Mr. Engineer, did you see those cars in question that he was coupling?

A. I saw them when they went back.

Q. Did you examine the couplers?

A. No, sir.

The COURT:

Q. How many cars away from you was the point at which he was working when he was injured; how many cars intervened?
A. Six.
Q. Those cars are about thirty feet long?
A. I suppose so.

103 Mr. CORNWELL: I will ask him a question to clear that up. What were they; cane cars or ballast cars?
A. Both cane and ballast cars.
Q. Were they American cars or French cars?
A. French cars.
Q. How many wheels are there under each one of the wagons?
A. Four.
Q. Then it is the small car, isn't it?
A. Yes, sir.

Mr. POVENTUD:

Q. How do you know that those cars are four wheeled cars; the car that caught this man between the car and the coal pile, or didn't you examine it at all?
A. I know that they have four wheels.
Q. And what are they for? Are they to carry coal?
A. We were going to use those cars that day for carrying earth.
Q. Did you use them also for carrying freight?

Mr. CORNWELL: I object to that as immaterial.
The COURT: That is not material. Get to the point.
Mr. CORNWELL: We admit that they are used for freight and everything else.

Q. Did you ever carry logs in those cars?

The COURT: Stricken out.

Q. You say the car that caused this injury to this Pedro Didricksen, you didn't examine it yourself after the accident?
A. No, sir.
Q. Well now what distance, more or less, were you from the engine to the platform of the flat car that caught this Didricksen between the car and the wall?

The COURT:

Q. How many cars?

104 A. Six.

Mr. POVENTUD:

Q. From the place where you were?
A. Yes, sir.
The COURT: That is what he said twice already.
Q. Is that sidetrack there straight or curved?
A. It has a slight curve.
The COURT: The map shows.
Mr. POVENTUD: Yes.

Q. Now there being six cars between you and where this man was standing, how is it possible that you could see him?
A. Because he stepped out in order that I could see him.
Q. And immediately thereafter you came back and found him on exactly the opposite side injured?
A. Yes, sir.
Q. Now when you came back and found him injured, were all those cars coupled together?
A. Yes, sir.

The COURT:

Q. All coupled solid with the pins so that you could pull them out?
A. Yes, sir.
Q. Now another question: Was the deceased unconscious at that time when you came back or could he speak?
A. He could speak; he had full consciousness.

Mr. POVENTUD:

Q. Did you hear the screams of this Pedro Didricksen?
A. No, sir.
Q. You didn't hear the screams of Pedro Didricksen?
A. No, sir.
105 Q. Didn't you tell somebody there in the station that you did hear his yells?
A. No, sir.
Q. How long after the accident did you pull that engine with the cars away from the side track?

Mr. CORNWELL: I object to that as immaterial.
The COURT: What difference does that make? He might have left it there for a month or a day? What difference does it make? What we are trying to find out here is how this accident happened.
Mr. POVENTUD: I withdraw the question.

Q. Now you said you found him between the coal pile and the side of the car; can you tell more or less which car was it? Was it the last car?
A. Between the two rear cars.
Q. Have you seen that coal pile now recently?
A. Not lately.
Q. Do you know from what side of that coal pile is it if ever they take any coal from it?

Mr. CORNWELL: I object to that unless he was there all the time.

Q. Did you use to work in that side track very often?
A. I worked there for eight or ten days.
Q. Going nearly every day or not?
A. Whenever I had necessity.
Q. In all those days that you went to that side track did you ever take any coal from that coal pile?
A. No, sir.

106 Q. And what was the purpose of your going into that side-track with your engine?

A. To pull out some cars.

Q. And this fellow Didricksen's business in that side track was simply to couple the cars?

A. Yes, sir; to couple the cars.

Q. Can you tell whether at first sight if you stand on that side track, you can see any inclination at all?

A. Yes, sir.

Q. At first sight; are you sure of that?

A. It is a slight grade but you can see it.

Q. And do you know whether the cars by reason of that grade are inclined towards one side or the other?

A. Yes, sir.

Q. And towards what side is the inclination, facing the back of the Lajas station, towards your right or towards your left?

A. Towards La Plata.

Q. Where is La Plata?

This question was not answered.

Mr. CORNWELL: Ask him if it is towards San German.

Mr. POVENTUD: I don't know that location either.

The COURT:

Q. Does it incline in towards the curve or towards the outside of the curve? Every man knows from common knowledge that in going around a curve the outside rail is the higher. If it is a sharp curve it is higher, and if it is not a sharp curve it is not so high.

Mr. POVENTUD:

107 Q. Do you know anything about meters and centimeters so as to tell how many centimeters is the inclination on that curve?

Mr. CORNWELL: I object to that as immaterial.

The COURT: The objection is sustained; it is not cross examination.

Mr. POVENTUD: He spoke of that.

The COURT: No, he spoke of the inclination of the grade but not of the curve.

Mr. POVENTUD: That is all.

A JUROR:

Q. When the cars bumped how far did that car move from the train?

A. I could not see the distance.

Q. More or less.

—. ——.

The COURT:

Q. The way you bumped, how far would it push the other car if you know?

A. About two yards, two varas.

A JUROR:

Q. Is this man employed in the company yet?
A. Yes, sir.

Witness retires.

108 ULISES CENTINO being called as a witness in behalf of the defendant, was duly sworn and testified as follows:

Interpreted.

Direct examination by Mr. CORNWELL:

Q. What is your name?
A. Ulises Centino.
Q. On the 30th of November, 1908, where were you working?
A. In the American Railroad Company.
Q. On the morning of November 30th, do you remember an accident at Lajas?
A. Yes, sir; I was there.
Q. Were you the fireman on that engine?
A. Yes, sir.
Q. State what you know about what passed there.
A. We were on the main track and Mr. Pedro Didricksen told us, let us back in to get some cars that are on the side track.
Q. At that time was the engine alone?
A. It had some other cars coupled.
The COURT: And——?
A. He told us, let us couple those flat cars, and we went in and coupled; then the cars did not couple and then he stepped out and signalled us to stop and of course after we stopped we remained there awaiting his further orders, and in view of the fact that five minutes had elapsed and he did not show up, then the engineer whistled several times and then as he did not approach he jumped off the engine and it was then that they were pulling him out from between some cars.

Mr. CORNWELL: That is all.

109 Cross-examination by Mr. POVENTUD:

Q. Did you see the place of the occurrence there after the accident?
A. Yes, sir.
Q. Did you walk with the engineer, together with him?
A. No, sir.
Q. When did you go?
A. After they had removed him from there.
Q. You didn't see him in the place where he fell?
A. No, sir.
Q. And you said that he signalled you and the engineer to stop the train?
A. Yes, sir.

Q. That was on the outside of the coal pile, wasn't it?
A. Somewhat distant.

Mr. POVENTUD: That is all.
Witness retires.

110 ARMANDO SARRAMEDA being called as a witness in behalf of the defendant, was duly sworn and testified as follows:

Interpreted.

Direct examination by Mr. CORNWELL:

Q. What is your name?
A. Armando Sarrameda.
Q. On the 30th of November of 1908 where were you working?
A. At the Lajas station.
Q. Do you remember an accident that happened there to Pedro Didricksen?
The COURT: Find out what his position was.
Q. What was your position there?
A. Station master.
The COURT: Now this man ought to know something about the accident.
Q. Do you remember an accident that happened there to Pedro Didricksen?
A. Yes, sir.
Q. Now state to the jury what you saw there and how it happened.
A. At eight o'clock in the morning while I was in the office I heard somebody screaming; I went to the rear part of the station, to a switch where they were making some maneuvers and I saw the conductor between the flat cars; then I went towards the engineer to tell him not to go further; not to move.
Q. Was the train stopped when you first saw the man?
A. Yes, sir.
Q. Proceed.
111 A. Then the engineer got off the engine and then I went to secure the help of four peons to take him out and sent him to town on a hand car.
Q. When you saw him was he conscious or unconscious?
A. He was conscious.
The COURT: Now tell the jury where he was. Was he between the ends of the cars or on the side of the car?
A. On the side.
Q. On the side of the car between that end and the coal heap?
A. Yes, sir; he was in that way.
Q. Well was he opposite the opening between the two cars or was he in the middle of two cars?
A. In front of the opening of two cars.

Mr. CORNWELL: That is all.

Cross-examination by Mr. POVENTUD:

Q. Mr. Sarrameda, are you actually an employee of the defendant?
A. No, sir.
Q. Where are you working now?
A. I am working with my father-in-law.
Q. Now when you went there after the accident was this man complaining or didn't he complain at all?

Mr. CORNWELL: I object to that on the ground that it is immaterial.

A. He was groaning.

The COURT: You may make him your witness for that purpose if you want to. You may show what the deceased told him if you wish, but you must make him your witness.

112 Mr. CORNWELL: I withdraw the objection. He may ask it on cross examination if he wishes.

Q. On what part of the body was it that he was caught?
The COURT: If you know.
A. I don't know but he said that the place where he felt pain was in the bladder because I didn't see where he was struck.

Mr. POVENTUD:

Q. Now, Mr. Sarrameda, what made you go to the place of the accident?

The COURT: He said because he heard the scream.
Mr. POVENTUD: The scream of whom?
The COURT: Of the deceased.

The COURT:

Q. How far did you have to go from the place where you were in the station to where the deceased was?
A. A small stretch; about twenty-five meters.
Mr. POVENTUD: Now, Mr. Sarrameda, you didn't see anything exactly at that time when he was in between the car and the coal pile.

The COURT: You are assuming a fact not in evidence. I am not satisfied yet which way he was injured.
Q. I am asking him whether he could see the position of the train at the time of the accident or whether he did not see anything at the time of the accident.
The COURT: The man's scream called his attention to it.
Mr. POVENTUD: That was after the accident.
The COURT: No, it was at the accident.

Q. Now, Mr. Sarrameda, did you see the position of the train at the time he was caught?

113 A. It was stopped.
Q. At the time he saw it it was stopped?
A. At that time I didn't see it.

Q. But the cars were coupled, were they?
A. Yes, sir.
Q. And after the accident all the cars were coupled?
A. All were coupled.

Mr. POVENTUD: That is all.

A JUROR:

Q. Is it possible for a car to couple on its return after it has been bumped?
A. I don't know.

The COURT: He is station agent and he probably would not know that. If the drawheads were set right, they would couple, but if they were out of position they probably would not couple that way.

Witness retires.

114 GEORGE S. FINDLAY being recalled as a witness in behalf of the defendant, testified as follows:

Direct examination by Mr. CORNWELL:

The COURT:

Q. What about the juror's question, Mr. Findlay? If you bump a flat car with another flat car and push it up the track a little and it comes back of its own motion, would it couple?
A. If the coupler is set, if one is set and the other is open, they will if they come back with sufficient velocity.
Q. When you bump, wouldn't that dislocate the coupling arrangement so that they would not couple when they came back?
A. It would not.

Mr. POVENTUD:

Q. What is the weight of these cars?
A. Four and a half tons.

Mr. CORNWELL:

Q. What kind of cars were they?
A. Small French cars.

The COURT:

Q. About how long are they, Mr. Findlay?
A. About twelve or fifteen feet.
Q. And those six were all that size?
A. Yes, sir; of this particular class one measures about twelve feet and one about fifteen feet.
Q. Then the six cars would be about seventy-five feet long?
A. Yes, sir.

A JUROR:

Q. If the lever on one side of that coupler does not work, it is necessary to work the other side?
A. That might be possible.

Q. Is it possible that it might couple with the impetus of six or eight feet coming back?

115 A. Two feet would do it if the lock pin was working freely; they would lock inside of a foot and couple.

Mr. POVENTUD:

Q. By the cars coming towards each other slowly, would they couple themselves?

A. That depends on the working of the lock pin. If it was rusty it would not drop into position quickly enough to catch the tongue.

Q. Did you have occasion to examine the cars in question?

A. No, sir.

Q. You didn't examine them the next day when you went there?

A. They were running in service at that time.

Q. And you did not examine these cars at that time?

A. No, sir.

A JUROR:

Q. Those French cars, have they two wheels or four wheels?

A. Four wheels; solid truck, a single truck; the car is built onto the truck; the body onto the truck.

A JUROR:

Q. Then they have eight wheels?

A. Four wheels; there is no truck at all; they are built solid onto the wheels and these wheels go with the body of the car.

The COURT:

Q. How do they go around the curves?

A. They are so small that they take the curves.

Witness retires.

116 TOMASA RIVERA being called as a witness in behalf of the defendant, was duly sworn and testified as follows:

Interpreted.

Direct examination by Mr. CORNWELL:

Q. What is your name?

A. Tomasa Rivera.

Q. Do you know Pedro Didricksen?

A. Yes, sir.

Q. How long have you known him?

A. A year.

Q. That is at the time of his death?

Mr. POVENTUD: I object to that.

The COURT: Do you propose to show that he was living with this woman?

Mr. CORNWELL: That he lived at her house and maintained a separate home.

After considerable argument, during which the jury is not present, the objection is overruled and counsel for plaintiffs excepts.

Q. How long had you resided with Mr. Didricksen as his wife?

Mr. POVENTUD: I object to that. It is leading.

The COURT: Yes, it is leading, and there is no evidence that she lived with him as his wife.

Q. In what capacity did you live with Mr. Didricksen when you lived with him?

This question was objected to and the objection was sustained.

Q. How much did Mr. Didricksen contribute to your support during the time you lived with him?

A. Ten dollars every month.

117 Q. Now who paid the rent of the house?

A. He did, three dollars.

Q. And who gave you the money besides, the ten dollars, and purchased your wearing apparel?

Mr. POVENTUD: I object to that as leading.

The COURT: The objection is sustained.

The COURT:

Q. What assistance per month did he give you and what did it consist of?

A. For my wearing apparel.

Mr. CORNWELL:

Q. How much did it amount to, more or less, every month?

A. Between seven and eight dollars.

Q. Then how much in all did he give you every month?

A. Sometimes twenty; sometimes twenty-five; etc.

Mr. CORNWELL: That is all.

Cross-examination by Mr. POVENTUD:

Q. How old are you?

A. Thirty-nine.

Q. Do you know how old Pedro Didricksen was?

A. I don't know.

Q. Was he a young looking man?

A. Yes, sir.

Q. Where did you happen to meet him?

A. I was at my house and he went there to make love to me.

Q. He went there expressly for that purpose?

A. Yes, sir.

Q. Did he always give you monthly those twenty dollars?

A. Yes, sir.

118 Q. As a matter of fact, didn't you live with somebody else before you did with him?

A. No, sir.

The COURT: You needn't ask those questions. The woman said that she is not his wife.

Q. Is there any month in which he didn't pass you anything at all?

A. No, he always gave something to me.

Witness retires.

119 EMILIO DURAN CINTRON being called as a witness in behalf of the defendant, was duly sworn and testified as follows:

Interpreted.

Direct examination by Mr. CORNWELL:

Q. What is your name?
A. Emilio Duran Cintron.
Q. Where do you work?
A. In the plantation Fortuna.
Q. That is Guanica Central?
A. Yes, sir.
Q. In 1908 where did you work?
A. With the American Railroad Company.
Q. Now where did you work?
A. I was telephone operator in the Ponce station.
Q. Did you know Pedro Didricksen?
A. Yes, sir.
Q. Do you know where he lived?

Mr. POVENTUD: I object to that if Your Honor please. That is not material.

The COURT: It is leading up. There is no need of your objection until he gets to something material.

A. He kept a woman and part of the time he lived with her and some of the time he went to his own house.
Q. Do you know how much he gave this woman?

The COURT: How could he know that?

Q. Did you ever take money to this woman for Pedro Didricksen?
A. No, sir; never.
Q. Were you ever present when he paid her money?
A. Yes, sir.

Q. Then do you know how much he gave her?

120 A. He gave her money for the house, for her wearing apparel and for her support.

The COURT:

Q. How do you know that?
A. Because he made the distribution in the station and sent it out.
Q. How many times did you see him do that?
A. At least four or five fortnights.

Mr. CORNWELL: That is all.

Cross-examination by Mr. POVENTUD:

Q. Did he always make that distribution there in the station?
A. Yes, sir; always in the station.
Q. And who came for the money to take it to this woman?
A. Sometimes he sent it with somebody and sometimes he himself took it over.
Q. And he always made the distribution before you and before leaving the station and stated that so much was for clothing and so much for the house rent?
A. Yes, sir.
Q. And he always called you before he made that distribution?
A. Sometimes he did that at the telephone station where we were working and received our money.
Q. That was the first thing he did?
A. Yes, sir; when he got the money he made the distribution.
Q. And did he always specify so much for the house and so much for the clothing and so on?
A. Yes, sir.

A JUROR:

Q. When was it that this transaction took place, more or
121 less? The first payment and the last payment.
A. I don't remember those dates.

The COURT:

Q. Well, was it ten years ago or one year?
A. Before the accident when I was working at that place.

Witness retires.

122 DOMINGO ESTEPA being called as a witness in behalf of the defendant, was duly sworn and testified as follows:

Interpreted.

Direct examination by Mr. CORNWELL:

Q. What is your name?
A. Domingo Estepa.
Q. Where do you work?
A. In the American Railroad Company.
Q. Do you know Pedro Didricksen?
A. I did.
Q. Did you ever work with him there in the railroad?
A. Yes, sir; he was my companion there.
Q. Did you know him the year prior to his death?
A. Two or three years prior to that.
Q. Where did he live?

Mr. POVENTUD: I object to this testimony.
The COURT: You have saved the point on it repeatedly. They are the judges of introducing this testimony.

A. I always went to get him or to procure him at the house of a certain lady.

Q. Did you ever act as his agent or messenger in taking money to her?

A. Yes, sir; while he was in Lajas, on one occasion he gave me ten dollars to take to a lady that came here today.

Mr. CORNWELL: That is all.

Cross-examination by Mr. POVENTUD:

Q. Can you tell, more or less, when that was?

A. Almost during the last days when the accident happened.

123 Q. Do you know where that woman lived?

A. Yes, sir; I knew and I know where she lives.

Q. Where?

A. In Jobo Street.

Q. Has she always lived there?

A. Yes, sir; and she still lives there.

Q. Were you at the station with him sometimes when he collected his money?

A. Yes, sir.

Q. What did he do when he collected his money?

A. Sometimes we went out together. We got our money together and I saw that he went into that place.

Q. Did he do anything else before leaving the station? Did he pay any bills there?

A. I didn't see him there, making any transactions.

Q. So he just took his money from the pay office and carried it himself?

A. Yes, sir; and he went away.

Q. But he didn't make any distribution with that money at all?

A. Yes, sometimes; occasionally he borrowed a couple of dollars for his breakfast and then he paid it there; that is all.

Q. Did you ever hear him when he collected that money say that he was going to devote part of that money to pay the house rent or clothing or light for his parents?

A. The only thing I know is that he said that he had to pay three dollars house rent for that lady.

Q. Is that the only thing you heard him say before leaving the station?

124 A. Sometimes he went with me because I used to go out with him to take lunch.

Q. But before leaving he didn't make any transaction that you saw?

A. No.

Q. At the station.

A. No, I have already said that he only disposed of a dollar that he had borrowed for getting his lunch.

Q. Were the employees of the company at the time of the paying always there together?

A. Yes, sir; they are almost all together when they collect their salary; most of them are present.

Mr. POVENTUD: That is all.
Witness retires.
Mr. CORNWELL: That is all.

125 *Testimony in Rebuttal.*

PEDRO CLAUSELS being recalled as a witness in behalf of the plaintiffs, testified as follows:

Interpreted.

Direct examination by Mr. POVENTUD:

Q. Mr. Clausels, did you have occasion the time you went there to take those measurements for that plat back of the Lajas station, to see; at first sight was it observable that there was any inclination or grade?

A. Not at first sight; nothing at first sight.

Q. But did you as a matter of fact subsequently find out if there was any inclination or grade?

A. Yes, sir; with the level.

Q. Is that the only way you could find it out?

A. Yes, sir; that is the only way.

Q. How much was there?

A. Five millimeters to a lineal meter.

The COURT: Ask him if he can put that in inches or in feet. How much is it per hundred feet? Everything goes by per cent with us. How much is the grade per hundred feet? For every hundred feet of length of track how much is the grade?

A. (After making a calculation.) Approximately three inches to a hundred feet. The incline or grade only covers a length of seven meters.

Q. Then that is the grade for seven meters. It isn't so very important; a quarter of one per cent.

Mr. POVENTUD:

Q. Now, Mr. Clausels, is that grade in that proportion that you have stated, sufficient to allow a car of itself to move?

126 The COURT: You can't ask him that; you haven't qualified him. There are a lot of conditions to come in there, whether it is a light or heavy car or long or short, and one end might be over the top of the grade. The jury are judges enough of that. A practical railroad man would know more about that than he would.

Mr. POVENTUD: Let me put the question for the purpose of the record.

Q. State whether or not in your opinion on that grade that you have just stated that runs on that side track for seven meters only, whether a car of its own impulse could have slipped or run in any direction on said grading.

Mr. CORNWELL: Objected to on the ground that he has not properly qualified the witness.
The COURT: Sustained.
Mr. POVENTUD: We note an exception to that.
The COURT: I will let him answer.
Mr. CORNWELL: Note an exception.

A. It is very difficult; you have to push it in order to move it.

Mr. POVENTUD: That is all.
Mr. CORNWELL: No cross examination.
Witness retires.
Mr. POVENTUD: We rest.
Mr. CORNWELL: I want to call Mr. Findlay in sur-rebuttal to prove what the grade is.
The COURT: I won't permit that Mr. Cornwell.
127 Mr. CORNWELL: Note an exception. I want to renew my motion for the direction of a verdict.
The COURT: Yes, it is denied.
Mr. CORNWELL: Note an exception.

128 *Instructions to the Jury Delivered Orally from the Bench.*

GENTLEMEN OF THE JURY: It is not as easy for the Court to instruct you as it is for counsel to address you. In every sentence that a judge on the bench utters to a jury in the way of instructions, he is liable to err, and even liable to commit reversible error, hence he should measure his words.

This case, while simple in some aspects, is difficult in others. The first national employers' liability act passed by the Congress of the United States in 1906, after decisions both ways upon it in several of the States of the Union, was held unconstitutional by a divided court in the Supreme Court of the United States by a vote of five to four, hence Congress again proceeded to pass a new national employers' liability act, but made it applicable only to railroads as common carriers. It has already been held by some courts that the former employers' liability act as to other corporations than railroads is still in force in the Territories. But that question is not before us here today, because this suit is against a railroad and a common carrier. As I stated, it is hard for the Court off hand, without any decisions of the higher tribunal to guide it, to instruct you in accordance with the law, but however as the Court instructs you, it must be taken as the law for the time being.

You noticed this morning that the Court after mature consideration, or at least some consideration, struck out some evidence. It did so because it ascertained that to leave it to you would have
129 been error, and hence, as stated before, you must not consider the statements of the defendant's station agent made months after the accident, when he pointed out to the civil engineer the place where the accident occurred and the condition of things there at the time of the accident. The railroad station

agent was not then under oath, and, at any rate, he had no power at such time to bind the defendant.

I also struck out the alleged statement of the deceased said to have been made to his uncle twelve hours after the accident and at a different place. I became satisfied from an examination of the rulings of the highest tribunal in the land, that such alleged evidence is not permitted, and hence you will not consider either of the statements referred to.

Now in some cases, facts speak for themselves, and there is a motto of law, a Latin motto, res ipsa loquitur,—the facts speak for themselves, as it were, or the things do. But no matter how this may be, all facts do not prove negligence. In this case the man was injured so that he died. That does not of necessity prove the negligence of the defendant.

Another thing I want to call your attention to before I read to you the regular instructions I have had time to write, is that this is a different sort of a case from one where the person injured bears no relation to the defendant. Some of you sat on a jury the other day where a man was injured while loading cane on cars on a side track. He was not in the employ of the railroad company. He bore no relation to it,—he was an outsider. The rule of law in a case
130 like this is entirely different. When the relation is between employer and employee,—which is the better expression to use, the rule of law, as stated, is entirely different than when a passenger for instance is injured, and negligence is measured by entirely different rules. There is a contract relation in the one case to carry a man as a passenger on the railroad and to do it safely, and in the other, the plaintiff is engaged as an employee and presumably takes such risks as the law does not say he shall not take.

Now, there are accident cases where nobody is culpable of any negligence that resulted in the occurrence. They are known in law as inevitable and unavoidable accidents and nobody is responsible for them. Such cases can occur. Now with reference to any criminal side of this case, it is not as it is under the Spanish law, where the criminal action and the civil action are brought together in the same court at the same time, and the civil action carried on with the criminal prosecution. That procedure is entirely eliminated in this court at this time, and probably in the whole island, because the state or the government itself prosecutes separately for any crime connected with an occurrence of this kind, and the plaintiffs have nothing to do in that regard, nor have juries anything to do with it in a civil case, and therefore the law under which you are trying this case is what is known as a compensatory law. The right of action is given to compensate the plaintiffs for any losses that may have occurred to them from the negligence of the defendant.

The instructions that I will now read, will in some measure bring some of those points back to your mind.

131 The following are the instructions which were read to the jury.

GENTLEMEN OF THE JURY: This is an action brought by Federico Didricksen and his wife Luisa Rodrigues against the defendant, the

American Railroad Company of Porto Rico, for damages on account of the death of their son Pedro Didricksen, which they allege occurred in the latter part of the year 1903, in this district, on the defendant's railroad, through the negligence, default and wrongful act of the defendant railroad company. They allege that they are the sole heirs of their said son, as he had neither wife nor children, and that they are his legal representatives under an appointment of a proper surrogate or probate court of this island.

They lay their damages in the sum of thirty thousand dollars, but you are instructed that there is no evidence in this case that would warrant you in giving any such large sum to them, because, under the law as it will be hereafter quoted to you, the recovery must be compensatory for the loss sustained, and in this case the evidence is such that the rate of wages which the deceased was capable of earning, or earned would not authorize you in fixing damages in any such large sum. However, that is a limit beyond which you cannot go, nor, if you find for the plaintiffs, can you award damages in any sum more than what is sufficient to compensate them for the loss they have sustained. And in estimating these damages, you may take into consideration the fact that they are the father and mother of the deceased and the fact that they are deprived of
132 his society and any care and consideration he might take of them or have for them during his life. You may also take into consideration the character of man that the deceased had been proved to be; whether he was a good, kind and helpful son or the contrary, and you may take into consideration his age, his health, his probable duration of life and his earning capacity and the amount of his earnings or wages that he contributed towards the plaintiffs' support, and their dependence, if any, upon him, and the time that it shall continue, and the necessity that existed for them to depend on him for such assistance. In other words, the damages you shall award must be purely compensatory because the law does not permit you to award any "smart money" or punitive damages against the defendant for this unfortunate accident, as there is no evidence in the cause that shows that the same was maliciously brought about.

Now these statements are made to you for your guidance in case you find from a preponderance of the evidence, under these instructions that the defendant is liable to the plaintiffs in any sum whatsoever, and if under the facts as you shall so find them, after the law as given to you in these instructions is applied to the same, you do not find that the defendant is liable to the plaintiffs at all, then it is your bounden duty without fear or favor, and eliminating all sympathy and charity from the case, to find for the defendant squarely.

You are instructed that in this sort of a case it is competent for the plaintiffs to show the good character and industrious habits of the deceased and to show his earning capacity and the amount of
133 money that he contributed to them. And, on the other hand, it is competent for the defendant to show the bad or dissolute character of the deceased if it can truthfully do so, and with a view to showing that plaintiffs have not been damaged by the unfortunate

occurrence to as large an extent as they claim. And therefore you are not at liberty to resolve any fact or any doubt against the defendant because of the fact that it may in the course of its defense have brought persons of confessed dissolute character to testify as to the character of the deceased and the mode in which he spent his money.

You are instructed that this action is brought under the national employers' liability act of April 22, 1908, sections two, three and four of which have some application in this case and I read to you as follows:

SEC. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence, shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

134 SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

You are further instructed that under the Act of Congress of March 2, 1903, the national safety appliance act has been extended to the Territories, and I instruct you that that includes Porto Rico, and therefore it was the duty of this defendant to have had continuous brakes and automatic couplings upon their rolling stock, but that fact can have no bearing in this case unless you shall believe from a preponderance of the evidence that the absence of such safety appliances contributed to the injury or death of the deceased.

Sections one and two of the safety appliance act in question read as follows:

SEC. 1. That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

You are further instructed that it is the duty of every
135 employer, whether a common carrier or not, to afford a reasonably safe place for his or its employees to work in and to furnish them with reasonably safe appliances to work with. In this particular case, if you shall believe from a preponderance of the evidence that the accident in question occurred because of the nearness of the wall of chunks of coal to the railway track so that it did not afford sufficient room for the help attending the trains to pass between it and the side of the cars, then you are instructed that it was negligence for the railroad company to have put and left that wall of coal in such dangerous and negligent position; but if you further believe that such wall of coal was in plain sight and the fact that there was not room for him to pass between the cars and it, was, or could have, or ought to have been known by him when he saw it, then he took the risk of going between the cars and such wall of coal, and his own negligence in doing so is the proximate cause of his injury, and neither he nor his representatives can recover in this case, provided that you further believe from a preponderance of the evidence that the defendant did not have the continuous brakes and automatic couplers provided for by the Act of Congress, and that the absence of the same necessarily made this man go in such dangerous position between the cars and that he could not have seen the danger openly before him at the time.

You are further instructed that if you shall believe from a preponderance of the evidence that the defendant did not have upon its said cars the safety appliances provided for by the Act of Congress, and that it was necessary for the deceased to go between the
136 cars to couple them, then the plaintiffs are entitled to recover unless you further believe that going into such position was so dangerous as that the deceased could see it and be aware of it at the time he made the attempt to couple the cars, and that he had plenty of time and opportunity to avoid the danger had he so desired.

You are further instructed that if you shall believe from a prepon-

derance of the evidence that the accident occurred because of the locomotive engineer starting the train while the deceased was between the cars, then such negligence is the negligence of a fellow servant and the defendant is ordinarily not liable therefor to the heirs or representatives of the deceased, unless the necessity for his so going between the cars was brought about by a failure of the defendant to have upon its cars the safety appliances provided for by the Act of Congress.

Thus you can see that you must determine from a preponderance of the evidence what place the accident really occurred at, whether between the cars by the drawheads or bumpers striking the deceased or at the side of the cars by his being crushed between the car and the wall of coal, and how the deceased was injured, and the burden of proving all these facts is upon the plaintiffs, and that unless they show that the accident occurred through the negligence of the defendant, they are not entitled to recover.

If the accident occurred through the failure of the defendant in not having the safety appliances provided for by the Act of Congress, on its cars, then the deceased cannot be held to have assumed the risks of his employment, if such negligence of the defendant contributed to the injury in any way.

137 In any event, even though you may believe that the deceased has been guilty of contributory negligence, that fact will not bar a recovery, but the damages which you can award must be diminished in proportion to the amount of negligence attributable to the deceased, and in accordance with the rest of these instructions.

Therefore, if you find from a preponderance of the evidence on the whole case that the deceased was guilty of some contributory negligence, but that the defendant was also guilty of negligence, then you must still find for the plaintiffs, but you must diminish the damages as indicated. The only exception to this is that if you find from a preponderance of the evidence, as stated, that the injury to the deceased occurred by the narrowness of the passage between the side of the car and the wall of coal, and that the deceased was guilty of contributory negligence in putting himself in that dangerous position with the danger in sight directly before him, then the plaintiffs cannot recover at all, because the deceased's own negligence was the proximate and only cause of his injury and neither he nor any one for him is entitled to recover.

You are further instructed that if you believe from a preponderance of the evidence that the defendant had the safety appliances provided for by the Act of Congress, upon its cars at the time, and that it was unnecessary for the deceased to place himself in the dangerous position between the ends of the cars, provided you believe that the accident occurred there, then the deceased assumed the risk incident to that dangerous position and he assumed the risk of his fellow servant, the engineer, in starting the train at a time when it was dangerous to do so, and you should find for the defendant.

138 *Additional Oral Instructions Delivered to the Jury from the Bench after the Reading of the Written Instructions by the Court.*

You are the sole judges of the weight of the evidence and of the credibility to be given to any particular witness, and you can believe or disbelieve the whole or any portion of the evidence of any person who has testified in the cause. The Court desires to warn you that in this sort of a case you must consider it in that calm spirit which impartial people always do. On the one hand, you must not permit the plaintiffs to make a speculation of the suit. And on the other hand, you must not stand up so straight as to lean over backwards against the rights of these plaintiffs in the premises, and doing this, you will have done complete justice between the parties.

The Court will give you two forms of verdict; one reading: We, the jury, find for the plaintiffs and assess their damages at the sum of blank dollars. (The amount is in your discretion, should you find for the plaintiffs and hold that the defendant is liable)—in such sum as you believe to be right and just. The other form will read: We, the jury, find for the defendant. And if you find that way, that will end the case.

You should not in this case permit your sympathy to affect you in the least in your deliberations; and on the other hand, you should not allow plaintiffs to profit by your verdict. You can only compensate them. But you should, to the best of your ability, consider all the facts and circumstances of the case in arriving at a verdict.

You should also deliberate together and give reasons to each
139 other for the opinions you have, and if some of you find that you are wrong, change your opinions and agree with the others so that you may arrive at a verdict. These trials are expensive, both to the government and to the parties, and it has to go back upon the docket again in case you do not agree upon a verdict, and we have to go through the trial again at another term of court. However nothing that is here said to you, is intended to influence you one jot in your verdict or to cause any of you to give up your opinions to other jurors if you believe that injustice would supervene by so doing.

You should not permit your acquaintance with the counsel on either side, or your lack of acquaintance with either of them to affect you in your verdict. Neither should you allow the riches or the poverty of the parties or the fact that one is an individual and the other a corporation, to have as such the least weight in your deliberations or in your verdict. Whenever jurors permit that to be done, the administration of justice becomes a farce.

You should not permit yourselves to enter into the enthusiasm or excitement of counsel for one side or the other, but you should consider the cold facts as testified to on the stand, and apply the law as here given you, and decide the case on a preponderance of the evidence.

A preponderance of the evidence is a peculiar thing. It does not

necessarily mean the side that has the most witnesses or the most exhibits, or that sort of thing; it means simply the side that looks the most reasonable and that has the truth with it after a full, fair and impartial consideration of all the facts and circumstances of the case. Treating the case in that way, you will have the
140 best chance to do justice.

You may take with you the forms of verdict the Court prepared, the complaint, the answer, and the exhibits such as maps and other things put in evidence. Nobody but yourselves is responsible for your verdict. Neither counsel nor the parties have any right to question you for it. When you have performed your duty, we all will have to abide by it. If the Court has erred in any of its rulings or instructions, it will later hear a motion for a new trial and correct itself, but the facts you must now decide, and under these instructions render a verdict, and in that light the cause is submitted to you.

Mr. CORNWELL: We will take the general exception to the instructions now and note the specific exceptions afterwards.

We note an exception to the fact that only a portion, and not all of the instructions, are submitted to the jury in writing.

Mr. POVENTUD: For the purposes of the record I would like to put on the record general exceptions to the charge.

141 Counsel for the defendant thereafter noted the following specific exceptions to the charge of the Court:

I.

To that portion of the charge reading as follows: "Now in some cases, facts speak for themselves, and there is a motto of law, a Latin motto, res ipsa loquitur,—the facts speak for themselves, as it were, or the things do. But no matter how this may be, all facts do not prove negligence. In this case the man was injured so that he died. That does not of necessity prove the negligence of the defendant."

II.

To that portion of the charge reading as follows: "The right of action is given to compensate the plaintiffs for any losses that may have occurred to them from the negligence of the defendant."

III.

To that portion of the charge readings as follows: "However, that is a limit beyond which you cannot go, nor, if you find for the plaintiffs, can you award damages in any sum more than what is sufficient to compensate them for the loss they have sustained. And in estimating these damages, you may take into consideration the fact that they are the father and mother of the deceased and the fact that they are deprived of his society and any care and consideration he might take of them, or have for them during his life."

IV.

To that portion of the charge reading as follows: "You may
142 also take into consideration the character of man that the deceased has been proved to —; whether he was a good, kind and helpful son or the contrary, and you may take into consideration his age, his health, his probable duration of life and his earning capacity and the amount of his earnings or wages that he contributed towards the plaintiffs' support and their dependence, if any, upon him, and the time that it shall continue, and the necessity that existed for them to depend on him for such assistance."

V.

To that portion of the charge reading as follows: "In other words, the damages you shall award must be purely compensatory because the law does not permit you to award any "smart money" or punitive damages against the defendant for this unfortunate accident, as there is no evidence in the cause that shows that the same was maliciously brought about."

VI.

To that portion of the charge reading as follows: "You are further instructed that under the Act of Congress of March 2, 1903, the national safety appliance act has been extended to the Territories, and I instruct you that that includes Porto Rico, and therefore it was the duty of this defendant to have had continuous brakes and automatic couplings upon their rolling stock, but that fact can have no bearing in this case unless you shall believe from a preponderance of the evidence that the absence of such safety appliances contributed to the injury or death of the deceased."

143 VII.

To that portion of the charge reading as follows: "Sections one and two of the safety appliance act in question read as follows:

SEC. 1. That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

VIII.

To that portion of the charge readings as follows: "if you shall believe from a preponderance of the evidence that the accident in question occurred because of the nearness of the wall of chunks of coal to the railway track so that it did not afford sufficient room for the help attending the trains to pass between it and the sides of the cars, then you are instructed that it was negligence for the railroad company to have put and left that wall of coal in such dangerous and negligent position."

IX.

To that portion of the charge reading as follows: "provided that you further believe from a preponderance of the evidence that the defendant did not have the continuous brakes and automatic couplers provided for by the Act of Congress, and that the absence of
144 the same necessarily made this man go in such dangerous position between the cars, and that he could not have seen the danger openly before him at the time."

X.

To that portion of the charge readings as follows: "You are further instructed that if you shall believe from a preponderance of the evidence that the defendant did not have upon its said cars the safety appliances provided for by the Act of Congress, and that it was necessary for the deceased to go between the cars to couple them, then the plaintiffs are entitled to recover unless you further believe that going into such position was so dangerous as that the deceased could see it and be aware of it at the time he made the attempt to couple the cars, and that he had plenty of time and opportunity to avoid the danger had he so desired."

XI.

To that portion of the charge reading as follows: "You are further instructed that if you shall believe from a preponderance of the evidence that this accident occurred because of the locomotive engineer starting the train while the deceased was between the cars, then such negligence is the negligence of a fellow servant and the defendant is ordinarily not liable therefor to the heirs or representatives of the deceased, unless the necessity for his so going between the cars was brought about by a failure of the defendant to have upon its cars the safety appliances provided for by the Act of Congress."

145 XII.

To that portion of the charge reading as follows: "If the accident occurred through the failure of the defendant in not having the safety appliances provided for by the Act of Congress, on its cars, then the deceased cannot be held to have assumed the risks of his employment, if such negligence of the defendant contributed to the injury in any way."

XIII.

To that portion of the charge readings as follows: "In any event, even though you may believe that the deceased has been guilty of contributory negligence, that fact will not bar a recovery, but the damages which you can award must be diminished in proportion to the amount of negligence attributable to the deceased, and in accordance with the rest of these instructions."

XIV.

To that portion of the charge reading as follows: "Therefore, if you find from a preponderance of the evidence on the whole case that the deceased was guilty of some contributory negligence, but that the defendant was also guilty of negligence, then you must still find for the plaintiffs, but you must diminish the damages as indicated."

XV.

And to that portion of the charge reading as follows: "And on the other hand, you must not stand up so straight as to lean over backwards against the rights of these plaintiffs in the premises, and doing this, you will have done complete justice between the parties."

146 *Stenographer's Certificate.*

I, Arthur J. Harvey, Official Stenographer of the District Court of the United States for Porto Rico, hereby certify that the foregoing document, consisting of one hundred and six typewritten pages, is a true and corect transcript of all the evidence and the charge of the Court and exceptions thereto taken by counsel, in the case of Federico Didricksen et al. v. The American Railroad Company of Porto Rico, tried in the Ponce Division of the said Court at the January Term thereof, A. D. 1910, which said evidence and charge were reported by me in shorthand at the time of said trial and were thereafter by me transcribed from said shorthand notes.

ARTHUR J. HARVEY,
Official Stenographer of the District Court of the United States for Porto Rico.

147 The jury then retired and after a short absence returned into court with a verdict in favor of the plaintiffs Federico Didricksen and his wife Luisa Rodriguez for damages in the sum of six thousand dollars ($6,000.00) on the 20th day of January, 1910.

The foregoing constitutes the testimony, and statement of all the evidence introduced and offered upon the trial of this cause, with the instructions to the jury, exceptions thereto, and motions for direction of verdict at the close of plaintiffs' case and of the whole case, and exceptions to the overruling thereof.

I, Bernard S. Rodey, do hereby certify that I am the Judge before whom the above entitled cause was tried; that Arthur J. Harvey was the Official Stenographer of the court who reported said cause;

that the annexed and foregoing shorthand report of the evidence, duly certified to by the Official Stenographer, is the report of the evidence in said cause and contains all of the evidence offered, given or introduced in said cause by the respective parties upon the trial thereof; all objections and motions of the said parties thereto, or any part thereof, and all rulings of the Court upon such objections and motions, and all exceptions to such rulings, as well as the charge of the Court to the jury, the objections thereto, the rulings thereon and the exceptions to said rulings; the said report with this certificate is ordered to be filed and made a part of the record in this cause.

Signed this 3d day of April, 1910.

B. S. RODEY,
Judge of the District Court of the United States for Porto Rico.

148 And the said defendant, American Railroad Company of Porto Rico, on the — day of April, 1910, and within the time allowed by law, tendered this its bill of exceptions, it having been reduced to writing and all of the exceptions taken by the defendant during the progress of said trial being embraced therein, praying that the same be signed, sealed and made a part of the record in this cause, which is accordingly done on the 3d of April, 1910.

B. S. RODEY,
Judge of the District Court of the United States for Porto Rico.

149 In the District Court of the United States for Porto Rico.

I, John L. Gay, Clerk of the District Court of the United States for Porto Rico do hereby certify that *the* foregoing one hundred and forty eight typewritten pages to be a true and correct copy of the record and proceedings in the case of Federico Didricksen and his wife Luisa Rodrigues—vs.—American Railroad Company of Porto Rico as the same remains of record and on file in the office of the Clerk of said Court, in accordance with the præcipe filed by the Defendant herein.

In testimony whereof I have hereunto set my hand and affixed the seal of said district court this 17th day of May A. D. 1910.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY, *Clerk,*
By A. AGUAYO,
Deputy Clerk.

150 [Endorsed:] No. —. In the District Court of the United States for Porto Rico. Federico Didricksen et al. vs. The American Railroad Company of Porto Rico. Transcript of record.

151 *Return on Service Writ.*

UNITED STATES OF AMERICA,
The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed Writ on the therein-named José A. Poventud, Attorney for Plaintiffs, by handing to and leaving a true and correct copy thereof with José A. Poventud personally at Ponce, in said District on the 19 day of March A. D. 1910.

H. S. HUBBARD,
U. S. Marshal.
GEO. TRAUTMAN, *Deputy.*

152 In the District Court of the United States for Porto Rico.

FEDERICO DIDRICKSEN and His Wife, LUISA RODRIGUEZ, Plaintiffs,
vs.
THE AMERICAN RAILROAD COMPANY OF PORTO RICO, Defendant.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Bernard S. Rodey, Judge of the District Court of the United States for Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the United States for Porto Rico before you, between the American Railroad Company of Porto Rico, plaintiff in error, and Federico Didricksen and his wife Luisa Rodriguez, defendants in error, a manifest error hath happened to the great damage of the said American Railroad Company of Porto Rico, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given,
153 that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at the city of Washington on the 18th day of May next, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States, this 18th day of March, in the year of our Lord one thousand nine hundred and ten.

JOHN L. GAY,
Clerk of the District Court of the United States for Porto Rico.

Allowed by:

B. S. RODEY,
Judge of the District Court of the United States for Porto Rico.

Service of within writ of error and receipt of a copy thereof is hereby admitted this 19th day of March, 1910.

JOSÉ A. POVENTUD,
Attorney for Defendants in Error.

I hereby certify that an attested copy of this writ is on file in the Clerk's office of the District Court of the United States for Porto Rico.

JOHN L. GAY, *Clerk*,
By A. AGUAYO, *D'p'ty.*

154 [Endorsed:] No. 242. Ponce. In the District Court of the United States for Porto Rico. Federico Didricksen and his wife, Luisa Rodriguez vs. The American Railroad Company of Porto Rico. Writ of Error. Marshal's fee: 1 Service $2.00. Clerk's office, United States District Court. Filed March 23, 1910. John L. Gay, Clerk of the Court. By A. M. Bacon, Deputy.

155 *Return on Service Writ.*

UNITED STATES OF AMERICA,
The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed writ on the therein-named José A. Poventud, Attorney for plaintiffs by handing to and leaving a true and correct copy thereof with José A. Poventud personally at Ponce in said District on the 19 day of March, A. D. 1910.

H. S. HUBBARD,
U. S. Marshal.
GEO. TRAUTMAN, *Deputy.*

156 In the District Court of the United States for Porto Rico.

FEDERICO DIDRICKSEN and His Wife, LUISA RODRIGUEZ, Plaintiffs,
vs.
AMERICAN RAILROAD COMPANY OF PORTO RICO.

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States to Federico Didricksen and his wife, Luisa Rodriguez, and José A. Poventud, their attorney, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, within sixty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for Porto Rico, wherein the American Railroad Company of Porto Rico is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 18th day of March, A. D. 1910, and of the Independence of the United States the one hundred and thirty-fourth.

B. S. RODEY,
United States District Judge for Porto Rico.

Attest:

[Seal United States District Court for the District of Porto Rico.]

—— ——, *Clerk.*

157 [Endorsed:] No. 242. Law. Ponce. In the District Court of the United States for Porto Rico. Federico Didricksen and his wife Luisa Rodriguez, vs. American Railroad Company of Porto Rico. Citation. Marshal's fees: 1 Service $2.00. Clerk's office, United States District Court. Filed March 23, 1910. John L. Gay, Clerk of the Court. By A. M. Bacon, Deputy.

158 In the District Court of the United States for Porto Rico.

Law. No. 242.

FEDERICO DIDRICKSEN and His Wife, LUISA RODRIGUEZ,
vs.
THE AMERICAN RAILROAD COMPANY OF PORTO RICO.

Supplement to Transcript of Record.

On the 10th day of May, A. D. 1910, the plaintiffs by their attorney filed in the Clerk's office a certificate from the official stenographer of the court aforesaid, said certificate is as follows, to wit:

In the District Court of the United States for Porto Rico, Ponce.

Law. No. 242.

FEDERICO DIDRICKSEN et al.
vs.
THE AMERICAN RAILROAD COMPANY OF PORTO RICO.

I, Arthur J. Harvey, Official Stenographer of the District Court of the United States for Porto Rico, hereby certify that I reported the above entitled case in short hand at the time of the trial thereof, and that my notes of said trial show that counsel for both plaintiffs and defendant saved general exceptions to the instructions of the Court before the jury left the box. I further state that counsel for defendant did not save specific exceptions to said instructions of the Court until the same were written out by me, which according to my recollection, was a day or more after the jury left the box to consider of their verdict. This statement is issued at the request of counsel for plaintiffs.

ARTHUR J. HARVEY,
Official Stenographer of the District Court of the United States for Porto Rico.

159 In the District Court of the United States for Porto Rico.

I, John L. Gay, Clerk of said Court, do hereby certify the foregoing to be a true and correct transcript of a certificate from the official stenographer of the court on file and of record in this office in the therein stated case. And at the request of counsel for plaintiffs in said case the same is transmitted to the Supreme Court of the U. S. as a supplement to the transcript of the record of the case.

Witness, my official signature and the seal of said Court at Ponce, P. R. this 23d day of May, A. D. 1910.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY, *Clerk*,
By A. AGUAYO, *Deputy*.

160 [Endorsed:] No. —. In the District Court of the United States for Porto Rico. Federico Didricksen and his wife Luisa Rodriguez vs. American Railroad Company of Porto Rico. Supplement to Transcript of Record.

Endorsed on cover: File No. 22,215. Porto Rico D. C. U. S. Term No. 315. The American Railroad Company of Porto Rico, plaintiff in error, vs. Federico Didricksen and his wife, Luisa Rodriguez. Filed June 7th, 1910. File No. 22,215.

FILED
NOV 10 1912
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 72.

AMERICAN RAILROAD COMPANY OF PORTO RICO,
PLAINTIFF IN ERROR,

vs.

FEDERICO DIDRICKSEN AND LUISA RODRIGUEZ.

BRIEF FOR PLAINTIFF IN ERROR.

N. B. K. PETTINGILL,
F. L. CORNWELL,
Attorneys for Plaintiff in Error.

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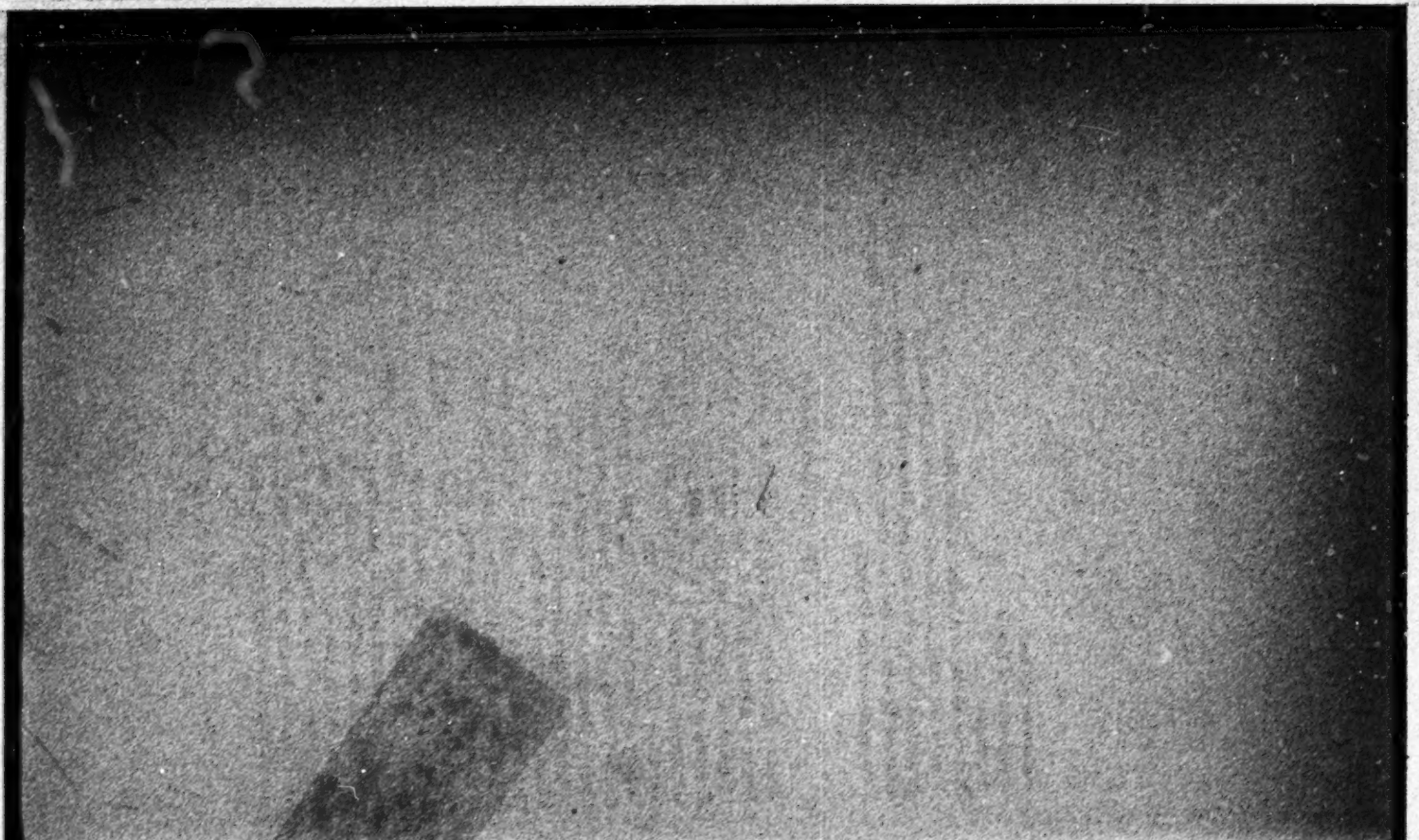

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 72.

AMERICAN RAILROAD COMPANY OF PORTO RICO,
PLAINTIFF IN ERROR,

vs.

FEDERICO DIDRICKSEN AND LUISA RODRIGUEZ.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Case.

Suit was brought by the defendants in error in the District Court of the United States for Porto Rico, under the Federal Employers' Liability Act of 1908, to recover damages from the plaintiff in error (hereinafter called the company, because of the death of their son, Pedro Didricksen while employed as conductor on a freight train of the company, said death being alleged to have been caused by its negligence as the result of an injury suffered by him on the 30th day of November, 1908, within the island of Porto Rico. The original complaint was, by permission of the court, amended in several particulars, the amendments being underscored in the printed record (pp. 1-3). The demurrer and answer of the company were filed before all these amend-

ments were made, but by subsequent order said demurrer and answer were considered as filed to the complaint as finally amended (p. 7). The answer of the company was a denial of all the material allegations except the employment and the fact of death, while its ninth paragraph alleged that the deceased had met his death through his own fault and negligence and without any negligence on the part of the company (pp. 5-6).

Trial was had in January, 1910, which resulted in a verdict against the company for the sum of $6,000, upon which judgment was duly entered (p. 8). To review that judgment the present writ of error was brought.

Numerous errors were assigned at the time of suing out said writ of error and made a part of the record in the court below (pp. 27-32), from which we select the following in substance as the errors to be relied upon in the argument which follows:

Assignment of Errors.

I.

The court below erred in admitting in evidence against the objection of defendant a map made by witness Pedro the place of the accident to deceased, as Exhibit D for plaintiffs.

II.

The court below erred in admiting in evidence against the objection of defendant a map made by witness Pedro Clausels and alleged to represent not only permanent but movable objects at the place of the accident to deceased.

III.

The court below erred in admitting in evidence against the objection of defendant a second photograph, offered as indicating "the position of the car with reference to the coal

pile" at the place and time of the accident to deceased, as Exhibit F for plaintiffs.

IV.

The court below erred in denying defendant's motion for the direction of a verdict in its favor at the close of the evidence on behalf of plaintiffs.

V.

The court erred in denying defendant's motion for the direction of a verdict in its favor at the close of all the evidence in the case.

VI.

The court below erred in charging the jury of its own motion as follows:

> "The right of action is given to compensate the plaintiffs for any losses that may have occurred to them from the negligence of the defendant."

VII.

The court below erred in charging the jury of its own motion as follows:

> "However, that is a limit beyond which you cannot go, nor, if you find for the plaintiffs, can you award them in any sum more than what is sufficient to compensate them for the loss they have sustained. And in estimating the damages, you may take into consideration they are the father and mother of the deceased and the fact that they are deprived of his society and any care and consideration he might take of them, or have for them during his life."

VIII.

The court below erred in charging the jury of its own motion as follows:

"If you shall believe from a preponderance of the evidence that the accident in question occurred because of the nearness of the wall of chunks of coal to the railway track so that it did not afford sufficient room for the help attending the trains to pass between it and the sides of the cars, then you are instructed that it was negligence for the railroad company to have put and left that wall of coal in such dangerous and negligent position."

IX.

The court below erred in charging the jury of its own motion as follows:

"Provided that you further believe from a preponderance of the evidence that the defendant did not have the continuous brakes and automatic couplers provided for by the act of Congress, and that the absence of the same necessarily made this man go in such dangerous position between the cars, and that he could not have seen the danger openly before him at the time."

X.

The court below erred in charging the jury of its own motion as follows:

"You are further instructed that if you shall believe from a preponderance of the evidence that this accident occurred because of the locomotive engineer starting the train while the deceased was between the cars, then such negligence is the negligence of a fellow-servant, and the defendant is ordinarily not liable therefor to the heirs or representatives of the deceased, unless the necessity for his so going between the cars was brought about by a failure of the defendant to have upon its cars the safety appliances provided for by the act of Congress."

XI.

The court below erred in entering judgment upon said verdict in favor of the plaintiffs.

ARGUMENT.

This court has jurisdiction under this writ of error, both because the amount of the judgment is over $5,000 and because the jurisdiction of the court below was based upon a cause of action arising under a law of Congress, hence was not one in which the judgment of a circuit court of appeals, had the writ been sued out to a territorial supreme court from that court, would be final.

Act of Congress of April 12, 1900, sec. 35 (31 Stats. 85).

Royal Ins. Co. *vs.* Martin, 192 U. S., 149, 159.

I.

Material Errors in Admission of Evidence.

Under this head we group the first three assignments of error.

A. *Admission of the photograph marked Exhibit D for plaintiffs.*

The proceedings regarding the admission of this piece of evidence are found on page 38 of the record. It is important, because the photograph was used to illustrate and enforce the testimony of witness Emilio Mendes, who was the only witness claiming to have seen *any part* of the circumstances attending the accident. The record shows as follows regarding this occurrence during the examination of that witness:

> "Mr. POVENTUD (counsel for plaintiffs): Ask him if he remembers the place if I show him a picture of it. Ans. Yes, sir.

"Question (handing a photograph to the witness): Can you state after looking at this if it represents the place of the occurrence. A. Yes, sir.

"Mr. Poverud: I offer this in evidence to illustrate his testimony.

"The Court: It will be admitted to illustrate the testimony of the witness.

"Mr. Cornwell (counsel for defendant): I object to it because there is no testimony to show that it is in the same condition as when the accident occurred."

The ruling was adhered to and the photograph admitted to the jury over the above objection, which seems to us elementarily sound. The witness proceeded to base all his important testimony upon it, yet the only question at any time asked of him as to identity of conditions appears at the top of page 39 in the following form: "Is that coal pile *in the same direction* it was when the accident occurred?" to which the answer was, "Just the same." As the dispute did not center about the *direction* of the coal pile, that information did not help the matter much. And the magnitude of the error and probability of prejudice was afterwards shown by the admission of the witness, who had actually taken the photograph, that it was taken at the same time as a map he was identifying, which was *twenty days* after the accident (pp. 55, 53). Yet he was allowed to indicate on this photograph everything which he claimed to remember about the accident.

B. *Admission of map made by witness Pedro Clausels.*

The witness first testified that he was a civil engineer and had gone to Lajas station to make the map, that the station-master told him where the accident had occurred, and that his visit was twenty days after the accident. After he had stated that the map showed objects and distances to scale, the following occurred:

"(By Mr. Poverstud:)

"Question. Show us where the coal wall was. Ans. Here is the coal bin or the coal pile (indicating on the plan).

"The Court: Do you offer it in evidence?

"Mr. Poverstud: Yes, sir.

"Mr. Cornwell: We object to it on the ground that it has other things on there to show cars and there is nothing to show that they were the cars that were there at the time of the accident and that they had the same dimensions.

"The Court: You may examine him fully about that first, then, before you offer it even.

"Question. What are these other three sketches you have got on there? Ans. They represent the cars so as to show the distance between the coal wall and the car.

"Question. And how much was it?

"Mr. Cornwell: He has not shown that they are the same cars that were there at the time of the accident.

"Question. Do you know whether these are the same cars that were there at the time of the accident? Ans. They are the same, according to the statement of the stationmaster.

"The Court: That won't do.

"Mr. Poverstud: That is the admission of an officer of the corporation.

"The Court: I guess that would be all right.

"Mr. Cornwell: Note my exception.

"The Court: Offer it now.

"Mr. Poverstud: Yes, I offer it in evidence.

"Mr. Cornwell: It is objected to on the ground that the map has on there improper representations of cars which it is shown were not the cars that were there at the time of accident.

"The Court: Overruled on the ground that an agent of the defendant said these cars represented on this sketch are the same as the cars used at the time of the accident."

And the map was not only allowed to go to the jury as a general plan of the situation as to permanent objects, but as to particular measurements of distances *as regards the cars* (pp. 53-54), of which the witness admitted he knew nothing except what had been told him by the stationmaster.

It needs no citation of authority to this court to prove that a stationmaster or station agent of a railroad company is not its agent for admissions as to matters so far outside the line of his duties. The court below evidently realized its mistake later when it took from the jury another statement of this stationmaster to this same civil engineer as to the "particular place where the accident occurred" (pp. 55, 60, top), but unfortunately the error now complained of was not corrected. The witness who made the map had no other information as to the identity or size of the cars, and no other evidence was produced to fill the gap. Hence we submit that the objection to the admission of the map should have been sustained, and that it was strongly prejudicial to the defendant, because the details of the measurements taken from this map as to the distance at different points between these supposed cars and the coal pile were impressed upon the jury by the examination of the witness in that regard, while the charge of the court shows that the contention of plaintiffs charging contributory negligence upon the company—and allowed to be submitted to the jury—was largely based upon the necessity of deceased going between those cars and that coal pile in order to perform his duty.

C. *Admission of photograph marked Exhibit F for plaintiffs.*

This incident is found on page 54 of the record, after the map had been admitted, and is set forth as follows:

"Question (Handing the witness *another* photograph): Will you look at that and state what it

represents? Ans. That is to indicate the position of the car wth reference to the coal pile.

"The COURT: Do you offer it?

"Mr. POVERTUD: Yes.

"The COURT: Show it to Mr. Cornwell.

"Mr. CORNWELL: It is objected to because there is nothing to show that it is the same car or a car of the same dimensions or that the coal pile was of the same dimension.

"Mr. POVERTUD: I will show that they are the same. I promise to connect it."

But counsel asked that witness only a few more questions which had no tendency to connect it, and called no other witness for that purpose. The rule of flexibility which permits a court sometimes to admit evidence provisionally on the promise of counsel to introduce the connecting link subsequently has, as we understand it, nothing to do with the proper and necessary identification or other circumstances showing admissibility of documents or pictures when offered, because the reason for such flexibility does not exist. We think defendant was entitled to have the photograph excluded unless its objection was properly overcome before it was admitted.

We therefore submit that it clearly appears from the effect of this evidence, as shown by the bill of exceptions, that its admission was substantially prejudicial to the defendant and necessarily misled the jury in their consideration of the question of whether any negligence on the part of defendant had been proven, the finding of such negligence being a prerequisite to the finding of their verdict in favor of plaintiffs.

II.

Verdict for Defendant Should Have Been Directed.

The fourth and fifth assignments of error may be discussed together under this head. The motion for direction of a verdict was made both at the close of plaintiffs' case (p. 59) and at the close of all the evidence (pp. 8 and 81). We think it should have been granted.

The issue between the parties was made by the allegations of the paragraphs of the complaint numbered 6 and 6a and the paragraphs of the answer numbered VI and IX. Said paragraphs of the complaint alleged that deceased at the time of the injury was exercising due care in the performance of the necessary work of coupling two flat-cars while standing between said cars and a wall of coal which defendant had negligently caused to be piled too near the track, and that while so employed he was suddenly caught between said cars and wall of coal by the careless act of a co-employee; that defendant was further negligent in not having automatic couplers and continuous brakes, as required by the safety appliance act, and in starting the two cars without notice while deceased was in the act of coupling them. Defendant's answer denied each of these things and alleged, on the contrary, that deceased met his death by his own carelessness solely. Let us see what evidence had been produced upon these issues.

Their first witness was Dr. Vogel (p. 34), who knew nothing of the accident itself and testified only as to its effects resulting in death. The second witness (p. 35) was the uncle of deceased and knew nothing but what his nephew had told him. He was at first not allowed to testify as to that, but was later (p. 43) recalled and repeated the story of the accident as related to him by his nephew; but that story was afterwards withdrawn from the jury as inadmissible (p. 60, typ). The next witness, Emilio Mendez (p. 37),

was the first claiming to know anything of the accident itself. He stated that he was coming from a field toward the station when he heard a noise and, as he heard the noise (which was the bumpers bumping together) he also heard a scream. Then, "upon hearing the screams the engineer stopped the engine, and, he (deceased), fell on the middle of the track." When counsel for plaintiffs asked, "State how he was caught there," witness replied, "When the train was about to couple, I didn't notice the way he was caught," but when he was led by asking "between what things was he caught," he replied "between the two bumpers at the coal bin." Later he changed that to "against the coal pile," and then, aided by the photograph which is the subject of the first assignment, he was able to indicate the point on the coal pile where he was caught and the point to which "he was rolled along." Then (p. 39) he explained further that the deceased "was caught between the side of the wall and the side of the car" and that he "was caught on the side and the coal wall turned him around." On cross-examination, although he admitted that the deceased, when witness first saw him, was "between the car and the coal pile," he insisted that deceased was crushed "between the two bumpers and then he was thrown to one side against the coal pile." He further testified that deceased was in charge of the train; that there was an engineer and fireman, but that these together with the stationmaster and Julio Roman and other peons came to the place of the accident after it had occurred; that the train stopped on account of the screams (which must be a supposition); that witness screamed, a woman screamed and deceased screamed once, and that he did not see deceased give any signal to the engineer by whistling or otherwise. Counsel started to ask a question in the form of (p. 41): "You stated before that the engine started and caught him. Do you know when it stopped?", but that was an unwarranted assumption, as witness had at no time stated anything about the engine starting. So far as his

testimony discloses, the train was in motion from the moment his attention was first attracted to it.

The next witness was the peon Julio Roman (p. 42), who admitted that he arrived after the accident had occurred and whose sole material statement was that the injured man was found "between two platforms" (evidently meaning below the space between the ends of two cars) and that "his feet were touching against the coal and his head was towards (on) the track." After him came the father of deceased, one of the plaintiffs (p. 46), who gave no testimony touching the accident itself. Then came the civil engineer, Clausels (p. 51), who testified solely about the map he had made and the photographs he had taken.

Lastly, the plaintiffs called Mr. Findlay, superintendant of transportation for defendant (p. 56), and he stated that "regular automatic couplers are used on every single car in the employ of the railroad on that day;" that the cars on the train which deceased was coupling had them; and that they were of the Gould make, and practically the same as are in use on the Pennsylvania railroad. At the bottom of page 57 appears the question to the witness whether that train and locomotive had continuous brakes, but after an objection had been overruled it seems to have been abandoned, as no answer is given.

Such was the condition of the evidence when plaintiff closed and defendant first asked for a directed verdict. With regard to the alleged violations of the safety appliance act, the automatic couplers were affirmatively proven to be in place without any indication that they were not in order, while no evidence had been obtained as to the continuous brakes. With regard to the allegations of negligence causing the accident, there seems to us to have been *no affirmative proof*. It appears that deceased was the conductor in charge of the train, and that he was for some purpose in a place of danger from which he failed to extricate himself; but why he was there and whether any other employee of

defendant knew he was there or had any reason to know it does not appear. It appears that the engineer was backing down the train, but whether in response to a signal from the deceased or without such signal does not appear. The only reference to any coupling of cars is contained in the answer of the witness Mendez that "when the train was about to couple, I did not notice the way he was caught" (p. 37). There is absolutely nothing to show that deceased went to the place where he was injured for the purpose of making a coupling or that, if he did, there was any necessity of his going there.

We submit, therefore, there was no sufficient evidence to support the allegations of the complaint charging negligence of the defendant or its employees as responsible for the accident. "It was not enough to show an accident and an injury."

Patton *vs.* Texas & P. R. Co., 179 U. S., 658.
Waters-Pierce Oil Co. *vs.* Deselms, 212 U. S., 159, 176.

It was therefore the duty of the court to grant the peremptory instruction requested by defendant at the close of plaintiffs' evidence.

Coughran *vs.* Bigelow, 164 U. S., 301, 307.

But, defendant's motion being denied, it proceeded to introduce evidence on its behalf to the following effect, so far as related to the circumstances of the accident:

José Ortiz testified (p. 65) that he was the engineer of the train of which deceased was conductor; that upon arrival at Lajas the train backed into a side track to pick up some cars; that the first car was coupled all right; then deceased gave a signal to back in further to couple some other cars. Then he says, "I suppose the two cars did not couple when they came together, the cars became somewhat separated and then he ordered to stop. I remained at a standstill, and in view

of the fact that some minutes had elapsed and I didn't see him, I saw the station agent had proceeded toward the car," so he jumped off and went in the same direction and found the accident had happened. He further stated that when deceased "ordered to stop" he was on the side of the train away from the coal pile, and that was the last time witness saw him; that deceased could have coupled the car from that side and witness did not know how or why he got on the other side of the car; that when the engine pushed the uncoupled cars away there was a small grade which would bring them back again; that the engine was six small cars away from where the conductor was, and that when witness came back to where the injured man was all the cars were coupled together.

The next witness was the fireman, Ulises Centino (p. 71), who stated all he knew in one sentence, which did not differ materially from the statement of the engineer. Then the station master, Armando Sarrameda, was called (p. 72). He stated that while he was in the office he heard a scream (which he afterward knew was that of deceased); that he then went to the rear of the station, where the switching was being done, and "saw the conductor between the flat cars;" that he went toward the engineer to tell him not to move; that the train was stopped from the moment he first saw it, and that when they reached the place of the accident all the cars were coupled. Mr. Findlay was also recalled (p. 74) to testify that if a flat car were "bumped" up a grade and came back of its own motion, it might couple if the couplers were properly set and it acquired sufficient velocity.

That was all the evidence having relation to the circumstances of the accident and, we submit, it left the case as wanting as before in anything indicating that the injury had been caused by any negligent act of the company or its other employees. It left the details of the fatal moment still untold and, so far as any *theory* was unfolded, it pointed to a return of the uncoupled car or cars by force of gravity and

the pinching of the injured man by such return. No other theory seems consistant with the uncontradicted testimony that after all was over *all* the cars were found to be coupled.

But we submit that plaintiffs could not ask the court and jury to indulge in theories or presumptions to support their case. It is plaintiffs' duty to *prove* some causal negligence by defendant or for which it is responsible. The fact of accident, even when coupled with proof of freedom from negligence on the part of the injured party—proof which did not exist in the case at bar—is not sufficient. And when proof of causal negligence for which defendant can be held responsible is wholly lacking, it is the duty of the court to direct a verdict.

Perkins vs. Northern Pac. R. Co., 193 Fed. Rep., 219.
Randall vs. Baltimore & O. R. Co., 109 U. S., 478.
Gunther vs. Liverpool L. & G. Co., 134 U. S., 110.
Bunt vs. Sierra, etc., Mining Co., 138 U. S., 483.
Patton vs. Texas & P. R. Co., 179 U. S., 658.
Looney vs. Metropolitan R. Co., 200 U. S., 480.

The statement of the principles as made in the last cited case seem to cover the whole ground:

> "But, on the other hand, plaintiff must establish grounds of liability against the defendant. To hold a master responsible, a servant must show that the appliances and instrumentalities furnished were defective. A defect cannot be inferred from the mere fact of an injury. There must be some substantive proof of the negligence. Knowledge of the defect or some omission of duty in regard to it must be shown" (p. 486).
>
> "But the negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another" (p. 488).

As there was no evidence that any movement of the train was made without signal from the deceased, but on the contrary direct evidence that signal was given, no responsibility can be claimed because of negligent movement of the train; hence there remains no possible contention of negligence in any respect, unless from the position of the coal pile. As to that, such contention could be answered in two ways: first, no evidence tends to show that he had any need to get between the coal pile and the car in the performance of his duty, nor that the engineer of the train had any knowledge, or reason to suspect, that he was there; and second, the evidence does show that deceased was perfectly familiar with the situation of the coal pile, as he had been there every day in similar work for some time (p. 40); hence, if he saw fit to go between it and the car, it was a risk of his employment which he voluntarily assumed.

Tuttle vs. Detroit, etc., Co., 122 U. S., 189.
Southern Pac. Co. vs. Seley, 152 U. S., 145.
Butler vs. Frazee, 211 U. S., 459.

In making this contention we are not unmindful of the provisions of section 4 of the Employers' Liability Act, under which the suit was brought; but the provision of that section that an employee "shall not be held to have assumed the risks of his employment" is limited to cases "where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death," etc. In the present case, as we have already shown, no evidence had been presented even tending to prove the company guilty of any violation of such a statute, much less that such a violation had "contributed to the death" of Didricksen.

Schlemmer vs. Buffalo R. & P. R. Co., 220 U. S., 590, 596.
Second Employers' Liability cases, 223 U. S., 1, 50.

So we submit that the court below was again remiss in its duty when it refused defendant's request for the direction of a verdict at the close of all the evidence.

III.

Erroneous Charges to Jury Upon Measure of Damages.

Two of the charges given the jury upon the question of measure of damages were excepted to and are assigned for error in the sixth and seventh assignments. The first is a general statement that the action is "to compensate plaintiffs for any losses" suffered by defendant's negligence. The second was doubtless intended as an explanation of that general statement, the court saying:

> "And in estimating these damages you may take into consideration that they are the father and mother of the deceased and the fact that they are deprived of his society and any care and consideration he might take of them," etc.

The jury were bound to understand this language as allowing, in fact directing, them to go outside the pecuniary loss which plaintiffs had sustained and to make an additional award for the loss of companionship and filial care. We understand that such is not the purview of the statute, but that the same should be limited to the *actual pecuniary value* to the plaintiffs of the life so unfortunately, but not willfully, sacrificed. We know of no decision under the Federal statutes, but cite the following under similar State statutes:

L. & N. R. Co. vs. Trammell, 93 Ala., 350.
Railway Co. vs. Morrison, 93 Tex., 529.

In the former case that court said:

> "The true measure of damages manifestly is that which gives her such sum as, being put to interest, will each year, by taking a part of the principal and adding it to the interest, yield $150, and so that the whole remaining principal at the end of the twenty-

seventh year, added to the interest on this balance for that year, will equal $150. This sum we find to be approximately $1,650."

In that case the income of deceased was approximately $300 per year, of which the proportion which the wife was considered likely to benefit by was fixed at one-half, and the life expectancy was 27 years. In the case at bar the parents could hardly expect to benefit more largely than the wife, as the marriage of the son would have been probable; while the expectancy of their lives was quite less than 27 years, as the father testified that he was born in 1858 (p. 46), and was therefore fifty years old at the time of the accident. The slightly larger income, therefore, would be at least offset by the shorter life expectancy—from which it becomes clear that the larger part of the jury's verdict of $6,000 must have represented the considerations specified in the above quoted charge, aside from and beyond the direct pecuniary loss.

We submit, therefore, that, unless these charges correctly stated the law, they were directly prejudicial to the defendant company.

IV.

Charges Erroneous Because Based Upon Assumptions of Fact Not Supported by the Evidence.

Under this head may be considered the eighth, ninth, and tenth assignments of error. Each of those assignments is based upon the proposition that a court has no right to give a jury instructions stating the consequences which may flow from their finding to be proven by a preponderance of the evidence matters which are really wholly unsupported by evidence. As we understand the decisions, this court has so held and has pronounced the giving of such instructions reversible error.

Keyser vs. Hitz, 133 U. S., 138.
Mitchell vs. Potomac Ins. Co., 183 U. S., 42.
Wilmington S. M. Co. vs. Fulton, 205 U. S., 60.

In the Mitchell case, *supra*, Justice Peckham said at page 49:

> "There was no evidence of any fire in the back cellar preceding the lighting of the match in the front cellar, and it would have been error to submit such a question to the jury for that reason."

In the Fulton case, *supra*, the present Chief Justice stated the same principle, reciting the proceedings under which the question arose in the following language, at page 77:

> "The remaining assignments assert the commission of error by the trial court in overruling motions to strike out the 2d, 3d, and 6th counts of the declaration, and in *refusing to instruct the jury* that no recovery could be had under any of those counts, because no evidence had been introduced tending to establish the commission of the particular acts of negligence charged in those counts. * * * We are constrained to the conclusion that prejudicial error was committed in these particulars. We think it is extremely doubtful whether there was any evidence in the record even tending to establish that, in a long-wall mine of the character of the one here in question, cross-cuts and stoppings thereof were essential. But be this as it may, certain is it that there is no evidence whatever in the record tending to support the claim that the absence of cross-cuts and stoppings in the mine in question was in any wise the cause of the accumulations of gas or the retention of the accumulated gas from the explosion of which Fulton was killed. * * * Under this condition of things we find it impossible to say that prejudicial error did not result."

And for that reason the judgment was reversed.

Let us apply the principle thus settled to the three instructions now complained of.

A. The instruction set forth in the eighth assignment of error directed the jury to find negligence which would render the defendant liable if the preponderance of the evidence showed that the accident occurred "because of the nearness of the wall of chunks of coal to the railway track so *that it did not afford sufficient room for the help attending the trains to pass between it and the sides of the cars.*" But there was absolutely no evidence tending to shew that that space was intended, or was ever used, for that purpose. On the contrary, the witness Findlay testified that the coal was a storage pile stacked along the track so that it could be put on and used by the engines of the company from time to time, and that the engine of this very train took coal from there every day (p. 61). Moreover, the testimony of plaintiff witness Calusels demonstrated that it was so close to the track that when cars were there no sufficient room was left for any person to pass between (p. 53). So, the instruction was not only unsupported by the evidence but misleading in its suggestions.

B. The instruction quoted in the ninth assignment is conditioned upon the jury finding "from a preponderance of the evidence that the defendant did not have the continuous brakes and automatic couplers provided for by the act of Congress," while we think we have already demonstrated from the summary of the evidence contained in subdivision II of this brief—which a detailed perusal of the evidence contained in the record will confirm—that there was *no* evidence tending to show absence of continuous brakes or automatic couplers.

C. The instruction complained of by the tenth assignment was based upon the suggestion that the jury might "believe from a preponderance of the evidence that this accident occurred because of the locomotive engineer *starting the train* while the deceased was between the cars." As al-

ready pointed out, no witness testified, or even suggested, that the engineer started the train under such circumstances. The principal witness for plaintiffs stated that the train was already in motion when his attention was first attracted to it (p. 37), the deceased being already caught and uttering a scream; and no other witness mentioned the starting of the train except the engineer and fireman, both of whom stated that it had stopped before the accident on the signal of the deceased who was then in sight (pp. 66, 71). Hence, there was no basis in the evidence for the suggestion that the train *started* while deceased was between the cars.

We therefore submit that each of the three instructions complained of were erroneous because unsupported by the evidence, were misleading because suggesting theories of the cause of injury inconsistent with uncontradicted testimony, and were therefore prejudicial to defendant, as additionally shown by the verdict rendered under their influence.

V.

It may be advisable to refer in a word to the certificate of the official stenographer which counsel for defendants in error have seen fit to have sent to this court as a "supplement to the transcript." The evident attempt is to show that the exceptions to the charge were taken too late. But for such a purpose no certificate or affidavit not forming part of the record proper in the court below can be considered in contradiction of the bill of exceptions properly signed and certified.

England vs. Gebhardt, 112 U. S., 502.
Nelson vs. Flint, 166 U. S., 276.
Lumber Co. vs. Franson, 208 U. S., 278.

While the bill of exceptions (p. 88) recites that counsel for the company asked permission to "note the specific ex-

ceptions afterwards," it states further a few lines below that said counsel "thereafter noted the following specific exceptions" and proceds to enumerate them *verbatim*; and it is only after these specific exceptions are inserted that the bill of exceptions proceeds (p. 91) to state: "The jury *then* retired and after a short absence returned into court with a verdict," etc. Such a recital is conclusive as against any certificate under the above authorities.

But it would further seem that the strictness of the rule requiring exceptions to be stated at length before the jury leaves the box is regarded as no longer consonant with the conditions of modern practice, and it is enough if exceptions be stated in open court (Zeno Gandia vs. Pettingill, 222 U. S., 452, 459). This the bill of exceptions expressly shows to have been done. So, we submit that the correctness of the charges to which exceptions are specified in the bill of exceptions must be re-examined.

VI.

Upon each and all of the errors assigned, we respectfully ask that the judgment of the court below be reversed and the cause be remanded thereto for a new trial or such other disposition of the same as may be consistent with the law as laid down by this court upon such reversal.

Respectfully submitted,

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F. L. CORNWELL,
Attorneys for Plaintiff in Error.

The Employers' Liability Act extends to Porto Rico, as held in *American Railroad Company* v. *Birch*, 224 U. S. 547, and now *held* that the Safety Appliance Acts also extend to Porto Rico.

While Porto Rico has not for all purposes been fully incorporated into the United States it is not foreign territory nor are its citizens aliens. *Williams* v. *Gonzales*, 192 U. S. 1. Its organization is in most essentials that of a Territory. *Kopel* v. *Bingham*, 211 U. S. 468.

In view of the provisions of § 3 thereof, effect cannot be given to the Employers' Liability Act of 1908 in Porto Rico unless the Safety Appliance Acts referred to in § 3 are in force there also.

Under the Employers' Liability Act of 1908 pecuniary damages only are recoverable and these do not include loss of society or companionship of a son to a parent. *Michigan Central Railroad* v. *Vreeland*, ante, p. 59.

5 Porto Rico Fed. Rep. 401, 427, reversed.

THE facts, which involve the construction of the Employers' Liability Act of 1908 before its amendment by the act of 1910, and the application of the act to Porto Rico, are stated in the opinion.

Mr. N. B. K. Pettingill and *Mr. F. L. Cornwell* for plaintiff in error.

There was no brief filed for defendants in error.

MR. JUSTICE LURTON delivered the opinion of the court.

This is an action under the Employers' Liability Act of April 22, 1908, 35 Statutes at Large, 65, c. 149, before its amendment by the act of April 5, 1910, 36 Stat. 291, c. 143. The plaintiffs were the surviving parents of Pedro Didricksen, an employé of the American Railroad of Porto Rico, who died from an injury sustained while in its service.

1. Many errors have been assigned. One assigned, but not noticed in the brief of appellant, goes to the capacity of the plaintiffs to maintain the action.

That the deceased left neither wife nor children is not denied. That the plaintiffs were, therefore, as his surviving parents, the sole beneficiaries under the statute is also conceded.

One of the defenses made by the answer was that the plaintiffs had not been appointed administrators as required by law, and had therefore no right to maintain this suit under the Liability Act of 1908. This was met after the jury had been summoned, by a motion, as shown by the plaintiff's bill of exceptions, "to amend the complaint by making the following interlineation: 'That plaintiffs are the duly appointed personal representatives of the deceased, appointed by the District Court of the Island of Porto Rico,' which leave is granted by the court." To this amendment the defendant excepted. A journal entry of the same date shows that in support of the motion the plaintiffs produced a certain certificate from the District Court of Porto Rico, and that the complaint was amended by interlining the words, after the word "support,"—"They were further the only personal representatives of the deceased."

This certificate is not in the transcript and we have no way of knowing its sufficiency as an appointment. The case went to the jury upon the issue of the capacity of the plaintiffs to sue, as well as upon the other issues. The court neither gave nor refused any instruction upon this point, and there was a general verdict for the plaintiffs.

2. The evidence upon the merits of the case, though obscure and meagre as to the circumstances of the accident, was such as to justify its submission to the jury.

3. The complaint averred that the cars composing the train in charge of the deceased as conductor were not equipped as required by the Safety Appliance Act of March 2, 1903, 32 Stat., 943, c. 976. There was some evidence tending to show that one or more of the couplers were not in repair and some evidence tending

to show that this had a causal connection with the accident. The court instructed the jury that the Safety Appliance Act applied to Porto Rico. Was this error?

The acts of March 2, 1893, 27 Stat., 531, c. 196, and April, 1896, 29 Stat., 85, related only to railroad companies engaged in interstate commerce. The traffic wholly confined to a Territory of the United States was therefore not within either. But the act of March 2, 1903, amended the former acts and extended their provisions to "common carriers by railroad in the Territories and the District of Columbia."

That the Employers' Liability Act of April 22, 1908, 35 Stat., 65, 291, c. 149, does apply to Porto Rico is plain, since it, on its face, extends to the District of Columbia, the Territories, the Panama Canal Zone and other "possessions" of the United States. That it did extend to Porto Rico was expressly decided in *American Railroad Company of Porto Rico* v. *Birch*, 224 U. S. 547. The question as to whether the Safety Appliance Act extended to that Island was reserved in the *Birch Case*.

We are of opinion that the act does extend to Porto Rico. It is true that the term, "possessions" of the United States is not used as in the Liability Act. The act does, however, provide that the former acts of which it is amendatory "shall be held to apply to common carriers by railroad in the Territories and the District of Columbia," etc. Though for all purposes the Island of Porto Rico has not been fully incorporated into the United States, it obviously is not foreign territory, nor its citizens aliens. *Gonzales* v. *Williams*, 192 U. S. 1, 15. Its organization is in most essentials that of those political entities known as Territories. It has a territorial legislature and a territorial system of courts. By the fourteenth section of the Foraker Act of April 12, 1900, 31 Stat., 77, 80, c. 191, "the statute laws of the United States not locally inapplicable . . . have the same

force and effect in Porto Rico as in the United States, except the revenue law."

In *Kopel* v. *Bingham*, 211 U. S. 468, Porto Rico was held to be a Territory within the meaning of § 5278, Revised Statutes, providing for the surrender of fugitive criminals by governors of Territories.

It is not easy to see how effect can be given to the Employers' Liability Act of 1908 in Porto Rico, without concluding that this act of 1903 is also in force there, since the former, as pointed out in the *Birch Case*, 224 U. S. 547, 555, provides in its third section, "that no employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death." The fourth section contains a like provision concerning assumption of risk.

These considerations lead to the conclusion that the court below did not err in ruling that the act extended to Porto Rico.

4. There was error in the rule for measuring the damages recoverable.

The cause of action which was created in behalf of the injured employé did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employé from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employé. The damage is limited strictly to the financial loss thus sustained. The court below went beyond this limitation by charging the jury that they might, in estimating the damages, "take into consideration the fact that they are the father and mother of the deceased and the fact that